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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 177

ROADWAY EXPRESS, INC., ALL STATES FREIGHT, INC., TERMINAL TRANSPORT, INC., TRANSAMERICAN FREIGHT LINES, INC., EASTERN EXPRESS, INC., OVERNITE TRANSPORTATION COMPANY, UNITED STATES RUBBER COMPANY, *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Delaware

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware was handed down on January 21, 1963, in *Roadway Express, Inc.* v. *United States*, 213 F. Supp. 868 (1963). It and the subsequent judgment in favor of defendants are appended hereto as Appendices A and B, respectively.

The reports of the Interstate Commerce Commission in *Western Exp. Co. Extension—Sealdtanks,* 84 M.C.C. 585, decided March 22, 1961, and in *Best Way of Indiana, Inc., Extension—Containers,* 86 M.C.C. 61, decided April 28, 1961, which prompted the filing of the cause below, are appended hereto as Appendices C and D, respectively.

The order of the Interstate Commerce Commission dated September 28, 1961, pursuant to which each of the aforementioned reports became administratively final, is appended hereto as Appendix E.

JURISDICTION

The cause below was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321 through 2325, inclusive, to set aside and annul an order of the Interstate Commerce Commission (a) denying to motor common carriers of general freight the right to use their vehicles to transport a new and unique type of container when tendered to such carriers by shippers under certain circumstances beyond the control of and not involving the carriers but not under certain other circumstances, and (b) refusing to grant to plaintiff carriers whatever additional motor carrier operating rights might be deemed by said Commission as necessary to authorize the unhampered transportation of the containers.

The decision and order of the three-judge district court was entered February 4, 1963, and Notice of Appeal was filed in that court by these appellants on April 3, 1963.

The jurisdiction of the Supreme Court to review this decision upon direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101 and is sustained by the fol-

lowing decisions: *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959); *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U.S. 73 (1960); and *American Trucking Assos.* v. *United States, I.C.C.,* 364 U.S. 1 (1960); and *Interstate Commerce Com.* v. *J-T Transport Co.,* 368 U.S. 81 (1961).

STATUTES INVOLVED

The provisions of the Interstate Commerce Act pertaining to this proceeding are as follows:

National Transportation Policy
49 U.S.C. preceding §§ 1,
301, 901, and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Requirement of Certificate

Section 206(a)(1) of the Interstate Commerce Act [49 U.S.C. § 306(a)(1)]

"* * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate * * * operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * *."

Issuance of Certificate

Section 207(a) of the Interstate Commerce Act [49 U.S.C. § 307(a)]

"* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that * * * the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity * * *."

Specification of Service

Section 208 of the Interstate Commerce Act [49 U.S.C. § 308]

"Any certificate issued under section 206 or 207 shall specify the service to be rendered * * *."

Judicial Review

Section 10(e) of the Administrative Procedure Act [5 U.S.C. § 109(e)]

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1)

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute * * *."

THE QUESTIONS PRESENTED

1. Whether the District Court erred in sustaining decisions of the Interstate Commerce Commission which are inconsistent with and abhorrent to the National Transportation Policy, in that under them:

a. The shipping public will be denied the services of general freight carriers shown by the Commission's own findings to be best able to provide economical and efficient transportation of liquid or dry-flowable commodities in a new and unique type of container, except to the extent that individual shippers are able to assume the burden of unnecessary and costly vehicle loading and unloading techniques.

b. Those shippers and receivers of liquid or dry-flowable commodities which are unequipped or otherwise unable to load and unload vehicles by the method prescribed would be restricted to use of the services of tank-truck carriers shown by the Commission's own findings to be ill-suited for or otherwise incapable of providing adequate, efficient, and economical service in the transportation of commodities in the new and unique containers.

c. Transportation costs will be held to artificially high levels without compensating benefit to the public at large.

2. Whether the District Court erred in sustaining decisions of the Interstate Commerce Commission holding that when a certificated motor carrier on two separate occasions renders the same shipper identical transportation services the service may be lawful in the one case and unlawful in the other, solely on the basis of the *method* of vehicle loading or unloading selected and utilized *by the shipper.*

3. Whether the District Court erred in sustaining decisions of the Interstate Commerce Commission holding that an ordinary highway trailer used to transport a liquid or dry-flowable commodity in a shipper-owned container is converted into a tank truck (a) by the act of the consigner in filling the container *after* placing it on the trailer, or, (b) after actual transportation has ceased, by the act of the consignee in emptying the container *before* removing it from the vehicle.

4. Whether the District Court erred in sustaining decisions of the Interstate Commerce Commission interpreting certain exceptions or limitations in the operating rights of appellant general commodity carriers according to restrictive concepts having no rational basis and in direct conflict with the purpose for which such exceptions and limitations were initially imposed.

STATEMENT OF THE CASE

The disposition of this cause will determine whether a new advance in the art of transportation will be fully exploited for the public benefit or have its use curtailed by administrative interpretation designed to protect and perpetuate the businesses of transporters incapable of utilizing the new improvement. That improvement consists of a new type of shipping container which may readily and economically be transported by the existing

equipment of the appellant motor carriers, all of which are authorized by the Interstate Commerce Commission to transport general commodities except, insofar as this cause is concerned, "commodities in bulk" and "commodities requiring special equipment."

Appellant United States Rubber Company is a manufacturer of the new type of shipping container and is also itself a shipper. The containers themselves were developed in three varieties, as follows:

(1) "Sealdtanks", ranging in capacities from 450 to 4,000 gallons, which are capable of being rolled or folded into a small space when empty.

(2) "Sealdrums", ranging in capacities from 55 to 1,000 gallons, which are collapsible when empty.

(3) "Sealdbins", ranging in capacities from 70 to 300 cubic feet, which are collapsible when empty.

As is immediately apparent, the advantages offered by the new shipping containers are their suitability for transportation on any type of general transport equipment, including flatbed and van-type trailers, their economy of space when returned empty on or in such trailers and (in the case of "Sealdtanks" and "Sealdrums") their adaptability to filling and emptying while actually upon the transporting vehicle. All of these advantages would be lost or seriously curtailed by the decisions of the Interstate Commerce Commission which appellants seek to have set aside as contrary to the law and which the statutory court below has sustained.

The two assailed decisions of the Commission hold that a general commodity carrier may not lawfully

transport a shipper's "Sealdtank", "Sealdrum", or "Sealdbin" unless said container was filled by the consignor before being loaded upon the vehicle and is to be emptied only after being taken from the vehicle by the consignee. They also hold that the placing of an empty "Sealdtank" upon the floor of a trailer and the filling of it after such placement thereby converts the vehicle into a tank truck, i.e., "special equipment" which may not be lawfully operated by appellant general commodity carriers. The vehicle conversion theory applies to ordinary vehicles used daily by appellant carriers for a wide variety of purposes.

The two decisions also hold unequivocally that if a shipper desires to use the services of a general commodity carrier for the transportation of a "Sealdtank" and its contents, such container must be filled before placement upon the trailer even though such a method requires the use of an otherwise unnecessary device, i.e., a "strongback" upon which to rest the container, and the use of cranes or similar equipment[1] to load and unload the container to and from the trailer itself. This last finding was in the face of uncontroverted evidence that, in actual practice, the obligation to load and unload the trailer is that of the shipper and not of the carrier and, therefore, not susceptible to direct regulation by the Commission.

The Commission's decisions would, in practical effect, prevent transportation of the containers by the general commodity carriers which, as an operating routine, endeavor always to balance their traffic so as to elimi-

[1] The consignor having no such facilities is thus foreclosed from using general commodity carriers to transport "Sealdtank" containers, and neither may a consignee having no such unloading devices receive a "Sealdtank" via a general commodity carrier.

nate empty operation of their vehicles. The tank truck operators, on the other hand, encounter substantial empty mileage because, by the very nature of their operations, they possess neither the vehicles nor the operating authority requisite for the transportation of general freight. Therefore to restrict the transportation use of the containers to tank truck operators only, as the Commission's decisions effectively do, would require that every shipment in a "Sealdtank" bear not only the cost of the outbound movement of its transporting vehicle but also that of the empty return movement as well.

The two decisions in which the foregoing pronouncements of the Commission were handed down were instituted by the appellant motor carriers for the purpose of securing a ruling that the existing authorization of general-commodity carriers embraces the right to transport commodities in the new containers or, in the alternative, to secure from the Commission whatever additional authorization might be found appropriate to permit the appellant motor carriers to provide such portion of that service as was shown by the evidence to be required by the public convenience and necessity. As already indicated, the appellant motor carriers were unsuccessful in both efforts. In the second of the two decisions, the *Best Way* case, the Commission adopted its earlier holding on the issue of certificate interpretation.[2] In both cases all applications[3] for modification

[2] 84 M.C.C. 64.

[3] Appellants Terminal Transport, Inc., Transamerican Freight Lines, Inc., Eastern Express, Inc., and Overnite Transportation Company, were applicants in the *Best Way* proceedings. Appellants All States Freight, Inc., and Roadway Express, Inc., were applicants in the *Western Express* proceeding.

of operating rights were denied despite a specific finding in the *Best Way* case that:

> "Here is a definite prospective need on the part of the shipping public for motor common carrier transportation of flowable, fungible commodities in C & S containers in quasi-bulk-type service has been shown."[4]
>
> * * * * * * * * *
>
> "Although the tank truck protestants as a group have not thus far engaged [in] any substantial transportation of commodities tendered into premounted C & S containers, they express a willingness and ability to do so, and their right to do so is explicitly affirmed in the Western Express case."[5]

Thus, the right to transport the instant containers was withheld from appellant carriers simply because protestants had voiced a "willingness and ability" to provide the service found to be needed. The availability of an economic and efficient service[6] from protestant carriers was thus assumed in the face of the following findings respecting such carriers:

> "The vast majority of the tank truck protestants do not operate the conventional van or flat-bed equipment necessary for efficient transportation of C & S container traffic, and with few exceptions they have published tariff minima of 4,000 gallons or 28,000 pounds applicable to their transportation of less-than-truckload quantities of authorized commodities. Also, for the most part, they do not have the benefit of return payloads in their opera-

[4] 86 M.C.C. 75.

[5] 86 M.C.C. 75-76.

[6] See the National Transportation Policy.

> tions, meaning that on an average between 40 and 50 percent of their line-haul mileage involves deadhead transportation, a factor reflected in the basic rate structure not only of protestants, but of all motor tank carriers."[7]

The Commission by its two decisions would force shippers to seek transportation of their containers by a class of carriers which generally does not operate equipment of the kind required and at tariff minima requiring the payment of truckload rates for the movement of individual small shipments, using a basic rate structure reflecting an empty mileage factor of between 40 and 50 percent.[8]

The order of April 28, 1961, issued by the Commission denied petitions for reconsideration of the two reports described above, three Commissioners being in disagreement.

The decision of a majority of the court below sustained the orders of the Commission. The dissent by Judge Wright concluded that reversal was justified because the Commission had ignored relevant portions of the National Transportation Policy and because its reasoning was difficult if not impossible to follow.

The court below thus has sustained decisions of the Interstate Commerce Commission which literally frustrate the very goal of regulation as expressed by the Congress of the United States in the National Trans-

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[7] 86 M.C.C. 73-74.

[8] The Commission's discussion of the evidence of record shows clearly that on longer movements the shipper encounters lower costs when shipping "Sealdtank" containers in general commodity service, 86 M.C.C. 70, 71, 72, 73; 84 M.C.C. 595. Nowhere in the record is there evidence to the contrary.

portation Policy[9] which not only precedes the Interstate Commerce Act but also permeates all its provisions. This Honorable Court has repeatedly held that the National Transportation Policy constitutes the criterion by which the correctness of the Commission's decisions is to be judged.[10] That Policy specifically provides that the Act itself shall be administered "to promote safe, adequate, economical and efficient service"; and "to encourage the establishment and maintenance of reasonable charges for transportation services."

The assailed decisions of the Commission are directly opposed to these goals in that they would deny to the transportation industry at large the means of achieving adequate, economical, and efficient service in the transportation of commodities susceptible to shipment in the new containers and, moreover, would deny to the public the right to demand a reasonable rate structure applicable to the transportation of such commodities which does not have built into it an allowance for recovery of the cost of empty operations over mileages roughly equal to those of the loaded operations.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents questions which are of vital importance to that large body of shippers of freight in liquid and dry flowable form; to motor carriers of general commodities which number in the thousands and are the backbone of this nation's system of common carriage by motor vehicle; and thus to the nation itself.

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[9] 49 U.S.C. preceding § 1.

[10] *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

Inherent in the Commission's approach is a philosophy which would deny to such carriers the right to progress apace with improved technology in the containerization of shipments and in transportation generally. Moreover, to reach a compromise interpretation of operating authorities the Commission has wittingly increased the cost of service to shippers and receivers of freight in order to protect the tank truck carriers from competition by general freight carriers.

A positive danger to effective and reasonable regulation of the motor carrier industry and thus to the public interest lies in the effort of the Commission to distinguish between the areas of permissible service by two complementary segments of the industry on grounds utterly different from the historical reasons for first recognizing and thereafter perpetuating such distinctions, and without reference to actual service required of the respective carriers.

Historically, the authorities of general freight carriers[11] have been conceived in terms of the type of vehicular equipment or other elements of service which a carrier has been called upon to provide. The general commodity certificate was invoked as a means of granting to recipients the right to provide transportation between authorized points or areas without limitation, except those actually specified, if any.[12] However, several areas of specialized motor carrier service were rec-

[11] This is not necessarily true of carriers with rights limited to specified or named commodities wherein service differentiations were not attempted.

[12] *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 301-302 (1948); *C. & U. Tank Lines, Inc.—Purchase —Comet Motor Exp. Co.*, 55 M.C.C. 791, 792 (1949); *Coastal Tank Lines, Inc.* v. *Pioneer Trucking Corp.*, 79 M.C.C. 101, 103 (1959).

ognized, and it was found that those carriers in the business of hauling general freight might, by reason of inability or unwillingness to do so, decline to provide such specialized service.

Thus a typical "general commodity" certificate might have one or more of five "usual exceptions," as follows:

(1) commodities in bulk;

(2) commodities requiring special equipment;

(3) articles of unusual value;

(4) household goods;

(5) dangerous articles or, alternatively, Class A & B explosives.

The first three exceptions listed reflect the absence of certain types of vehicles. In the case of "commodities in bulk", some carriers provided specialized tank trailers or dump trucks to haul liquid or dry flowable commodities which were simply pumped or dumped into the vehicle. General freight carriers transported the same commodities in ordinary vehicles if the shipper containerized the lading so that special vehicles were not required of the carrier. If a general freight carrier did not operate tank or dump trucks, its operating rights would reflect that fact through imposition of the "commodities in bulk" from exception.

In the case of "commodities requiring special equipment" some carriers provided either specialized low-bed or pole trailers to haul articles of unwieldly size and/or weight, or furnished whatever specialized loading and unloading service might be required, or both. The general freight carrier might transport the same

article—so long as there was required of it neither specialized vehicles nor specialized loading and unloading services.[13] If such was its limitation, the appropriate exception was imposed upon a "general commodity" grant.

In the case of "articles of unusual value" some carriers provided armored cars and trucks or armed guards to handle currency, gems, securities and other articles which by reason of their value and transportation characteristics were susceptible to theft. Where no such service was offered, the exception appeared. But the transportation of coin such as pennies and nickels has been found to be within the rights of general freight carriers—provided that neither armored vehicles nor guards were used in providing transportation. This is to say that if the carrier is called upon to provide nothing other than its ordinary service, the Commission has held that the general freight carrier might handle coin.[14]

In the case of household goods, some carriers provide a personalized and highly specialized padded van type of service catering to the particular needs of one moving his residence, or those seeking a similar packing and crating service. However, where all such specialized packing and loading services are performed by someone else, and actual transportation is provided in ordinary van trailers, the Commission has held that the line-

[13] *St. Johnsbury Trucking Co., Inc., Ext.—Heavy Hauling*, 53 M.C.C. 277 (1951); *W. J. Dillner Transfer Co.—Investigation of Operations*, 79 M.C.C. 335 (1959), 193 F. Supp. 823 (1961); *Dallas & Mavis Forwarding Co., Inc., Ext.—Galion, Ohio*, 79 M.C.C. 285 (1959).

[14] *Armored Motor Service Co., Inc., Ext.—Coin and Bullion*, 69 M.C.C. 609, 613 (1957).

haul transportation may be lawfully accomplished by general freight carriers.[15]

In the case of dangerous articles or, as sometimes specified, Class A & B explosives, some carriers have been willing to accept hazards involved in transporting them and to provide a service featuring all the special precautions required. Since it is impossible to provide the actual transportation of these commodities without having to deal with the hazards, there has been no circumstance recognized which would permit general freight carriers to handle this particular class of commodities. But where the hazard was not accepted and the service was withheld, the appropriate exception appears in the general commodity certificate.

That the usual exceptions arose from the fact that general freight carriers were unwilling, unequipped or unable to provide certain types of service was clearly acknowledged in the *Western Express* decision wherein the Commission quoted from an earlier decision, as follows:

> "The reason why general-commodity carriers have historically been excluded from transporting the classes of commodities described by these exceptions is well summarized in *Descriptions in Motor Carrier Certificates,* 61 M.C.C. 209, at page 268:
>
> > 'The motor common carriers of general commodities were not in the early stages of their development, and generally are not now equipped to handle dangerous explosives, money, securities, or other articles of very high value, household goods, sand, coal, and other commodities which usually move loose in bulk, or any com-

[15] *American Red Ball Transit Co., Inc.* v. *McLean Trucking,* 67 M.C.C. 305 (1956).

> modity which requires the use of equipment not ordinarily used in the movement of packaged or dry freight. Prior to the enactment of the Motor Carrier Act, previously referred to, the motor common carrier, insofar as interstate commerce was concerned, had no legal duty to transport all the traffic tendered to it, and consequently its holding out fell into well-defined channels. It transported such commodities only as would readily load onto its equipment without damage to other lading or to equipment and which would not exceed the carrying capacity of its vehicle. With the passage of the Motor Carrier Act, motor common carriers were permitted to continue such operations as they conducted on the critical date and continuously thereafter. The exceptions then as now reflect the general-commodity carriers' self-imposed limitations.' "[16]

The record in the case below shows unequivocally that the "Sealdtank" container and the other containers of record herein are such "as would readily load on its equipment without damage to other lading or to equipment and which would not exceed the carrying capacity of its vehicle."

All three variations of the collapsible rubber containers made by the United States Rubber Company are transported on ordinary equipment. The shipper supplies the container. The carrier provides nothing except its ordinary equipment and a driver. Neither specialized equipment nor specialized services are involved. This the Commission acknowledged by admitting[17] that under certain circumstances the general freight carrier might handle the containers without encountering the prohibitions against specialized services.

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[16] See 84 M.C.C. 598.

[17] 84 M.C.C. 601.

The Commission obviously sought to resolve the interpretation issue by reaching a compromise.[18] In so doing, the Commission abandoned the reasoning from which there were born the usual exceptions. It has adopted a theory of interpretation which threatens the future value and utility of thousands of general commodity certificates. It follows a philosophy which would force shippers to pay higher transportation costs for no reason other than to protect one segment of the motor carrier industry from more effective competition by another. It sacrifices the interests of the shipping public in an unwarranted effort to raise a protective umbrella over one particular type of carrier.

This Court has on a number of occasions held that the validity of the action of the Commission must be judged by the National Transportation Policy. In *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957), the Court stated, for example:

> "The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. Dixie Carriers, Inc. v. United States, 351 US 56, 100 L ed 934, 76 S Ct 578; Eastern-Cent. Motor Carriers Asso. v. United States, 321 US 194, 88 L ed 668, 64 S Ct 499; McLean Trucking Co. v. United States, 321 US 67,

[18] During the oral argument before the Court below the Commission's counsel stated, "The results are admittedly a compromise • • •." (Tr. 61). And further, "the compromise interpretation which was reached by the Commission after considerable soul searching which I just mentioned, did not accept either the extreme positions of the general commodity carriers or the bulk commodity opponents." (Tr. 62). See also Tr. 66, 72, 74.

88 L ed 554, 64 S Ct 370. Of course, the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. United States v Detroit & C. Nav. Co., 326 US 236, 241, 90 L ed 38, 42, 66 S Ct 75; Interstate Commerce Com. v Parker, 326 US 60, 89 L ed 2051, 65 S Ct 1490. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."[19]

* * * * * * * * *

"Viewing these conclusions in light of the National Transportation Policy we find at the outset that there has been no evaluation made of the 'inherent advantages' of the motor service proposed by the applicant. That policy requires the Commission to administer the Act so as to 'recognize and preserve the inherent advantages' of each mode of transportation."[20]

* * * * * * * * *

"Since the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail

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[19] 355 US 87-88.

[20] 355 US 89.

> service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said."[21]

That these same principles apply in controversies between motor carriers was established by the Court in *Interstate Com.* v. *J-T Transport Co.*, 368 U.S. 81, 91-92 (1961), wherein it was stated:

> "We think the matter of rates is one factor to be weighed in determining the need for the new service. In a contest between carriers by motor vehicles and carriers by rail, we held in Schaffer Transp. Co. v United States, 355 US 83, 2 L ed 2d 117, 78 S Ct 173, that the ability of a particular mode of transportation to operate with a lower rate is one of the 'inherent advantages' that one type may have over another within the meaning of the Act. 54 Stat. 899. By analogy, contract carriage may be more 'economical' than common carriage by motor or rail within the framework of the national transportation policy, as it is defined in the Act—'the Commission's guide' to the public interest. McLean Trucking Co. v. United States, 321 US 67, 82, 88 L ed 544, 554, 64 S Ct 370. It would seem hardly contestable that if denial of the application meant, for example, that a shipper's costs of transportation would be prohibitive, the shipper had established a 'need' for the more 'economical' service."

The Commission in the *Western Express* and *Best Way* cases adopted positions which are difficult if not impossible to justify in the light of the National Transporta-

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[21] 355 US 92.

tion Policy as interpreted and applied by this Court. If justification exists, the Commission made no attempt to make clear to a reviewing court the basis therefor. The Commission had a duty to do so.

In reaching the restrictive interpretation of the carrier appellants' operating rights, the Commission interpreted two of the usual exceptions appearing in general commodity certificates in direct contradiction to the admitted historic reasons for establishing them in the first place, invoking reasoning which lacks any rational basis, and accomplishing results which are manifestly incongruous.

This departure from established principles of interpreting general commodity certificates is damaging to the property rights of thousands of carriers operating in interstate commerce under such motor carrier authority. It suggests that the Commission will no longer consider the type of service or equipment which such a carrier is called upon to provide as a primary factor in the delineation of general commodity rights. It creates a strong presumption that new transportation techniques and devices will be denied to general freight carriers simply because such techniques and devices were not in existence when the Motor Carrier Act was passed in 1935. It will have a stagnating effect upon the development and service of the general freight carrier upon which the bulk of the shipping public, and particularly smaller businesses, must rely for their transportation needs. It discourages the development and utilization of new techniques in the art of transportation.

CONCLUSION

The question presented by this appeal are substantial and of sufficient public importance to require plenary consideration, with briefs and oral argument.

Respectfully submitted,

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May 31, 1963

Certificate of Service

I, John C. Bradley, one of the attorneys for Roadway Express, Inc., All States Freight, Inc., Terminal Transport, Inc., Transamerican Freight Lines, Inc., Eastern Express, Inc., Overnite Transportation Company, United States Rubber Company, hereby certify that on the 31st day of May, 1963, I served copies of the foregoing jurisdictional statement on the several parties as follows:

(1) On the United States, by mailing copies, duly addressed and postage prepaid, to Hon. Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; to John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; and, airmail postage prepaid to Alexander Greenfeld, United States Attorney, Wilmington, Delaware.

(2) On the Interstate Commerce Commission, by delivering a copy to Robert W. Ginnane, its General Counsel, and by delivering a copy to the office of James Y. Piper, Assistant General Counsel, at their offices in Washington, D. C.

(3) On the intervening defendants below National Tank Truck Carriers, Inc., and Chemical Leaman Tank Lines, Inc., et al., by mailing copies in duly addressed

envelopes with first-class or airmail postage prepaid as appropriate, to their attorneys as follows:

To Richard J. Hardy
1 North LaSalle Street
Chicago 2, Illinois

To H. James Conaway, Jr.
Bank of Delaware Building
Wilmington 1, Delaware

To Harry C. Ames, Jr.
216 Transportation Building
Washington 6, D. C.

To Leonard A. Jaskiewicz
600 Munsey Building
Washington 4, D. C.

.....

John C. Bradley
618 Perpetual Building
Washington 4, D. C.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 2419

ROADWAY EXPRESS, INC., ALL STATES FREIGHT INCORPORATED, TERMINAL TRANSPORT, INC., TRANS-AMERICAN FREIGHT LINES, INC., EASTERN EXPRESS, INC., LEE WAY MOTOR FREIGHT, INC., LEE WAY MOTOR FREIGHT OF INDIANA, INC., OVERNITE TRANSPORTATION COMPANY, SOONER FREIGHT LINES, UNITED STATES RUBBER COMPANY, REGULAR COMMON CARRIER CONFERENCE of the American Trucking Associations, Inc., *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

NATIONAL TANK TRUCK CARRIERS, INC., CHEMICAL LEAMAN TANK LINES, INC., E. BROOKE MATLACK, INC., LIQUID TRANSPORTERS, INC., HIGHWAY TRANSPORT, INC., P. B. MUTRIE MOTOR TRANSPORTATION, INC., LEMMON TRANSPORT CO., INC., and HEARIN TANK LINES, INCORPORATED, *Intervening Defendants.*

Jan. 21, 1963

George Tyler Coulson, Esq., of Wilmington, Del., Guy H. Postell, Esq., of Atlanta, Ga., Howell Ellis, Esq., of Indianapolis, Ind., William O. Turney, Esq., of Washington, D. C., and Roland Rice, Esq., and John C. Bradley, Esq. (Rice, Carpenter and Carraway) of Washington, D. C., for plaintiffs.

Alexander Greenfeld, Esq., United States Attorney, Wilmington, Del., Lee Loevinger, Esq., Assistant Attorney General, and John H. D. Wigger, Esq., of Washington, D. C., for United States of America; and James Y. Piper, Esq., and Robert W. Ginnane, Esq., of Washington, D. C., for Interstate Commerce Commission.

H. James Conaway, Jr., Esq., and Samuel R. Russell, Esq. (Morford, Young & Conaway), of Wilmington, Del., Nuel D. Belnap, Esq., and Richard J. Hardy, Esq. (Belnap, Spencer, Hardy & Freeman), of Chicago, Ill., Harry G. Ames, Jr., and E. Stephen Heisley, Esq., (Ames, Hill & Ames) of Washington, D. C., and Leonard A. Jaskiewicz, Esq., and Ronald N. Cobert, Esq. (Dow, Lohnes and Albertson) of Washington, D. C., for Intervening Defendants.

Opinion

BIGGS, Chief Circuit Judge, WRIGHT, Chief District Judge, and LEAHY, Senior District Judge.

LEAHY, Senior District Judge.

This action is brought by 11 plaintiffs who are 9 motor common carriers of general commodities, a manufacturer and shipper of collapsible rubber containers, and an association of motor common carriers to review certain orders of the Interstate Commerce Commission. The United States of America and the Interstate Commerce Commission are formal defendants. Intervening defendants are motor common carriers of commodities, in bulk, in tank trucks, or in other and similarly specialized vehicles, and an association of such carriers.

Two groups of multiple motor carrier application proceedings were before the ICC.[1] In both groups, numerous motor common carriers holding operating authorities from the ICC to transport general commodities, with certain

[1] Western Express Company Extension—Sealdtanks, 84 M.C.C. 585, was decided on March 22, 1961, by the entire Commission, with two commissioners dissenting; Best Way of Indiana, Inc. Extension—Containers, 86 M.C.C. 61, was decided by the entire Commission on April 28, 1961, with the same two commissioners concurring, based solely upon the previous findings of the majority in the earlier Western Express case.

commodity exceptions[2] discussed *infra*, filed with the ICC extension-of-service applications under § 206(b) of the Interstate Commerce Act, 49 USC § 306(b), for operating authorities to transport commodities not included in their previous certificates, and pleas for appropriate certificates of public convenience and necessity to issue[3] for the extension of the operations sought. These applications were coupled with requests, or motions, that the ICC, in interpreting the previously-issued certificates, dismiss the applications on the ground such outstanding certificates had already authorized transportation of commodities sought by the extension applications.

In the *Western Express* group of 14 application cases, and in the *Best Way* group of 211 applications, all sought specific authority from the ICC to transport liquid and dry flowable[4] commodities in certain newly-developed "collapsible" or "stackable" rubber containers (hereafter referred to as C & S containers) over routes and territories they now serve pursuant to their existing certi-

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[2] The typical general-commodity descriptions appearing in plaintiffs' certificates read: "General commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment." 84 M.C.C. 597.

Absent any exceptions to the authorization to a general carrier, the carrier may transfer any commodity in any equipment by any means of handling. Coastal Tank Lines, Inc. v. Charlton Bros. Transp. Co., 84 M.C.C. 289, 297, 301, 302 (Division 5, 1948), order sustained, Coastal Tank Lines, Inc. v. United States, 9 F.C.C. par. 80,838 (D.C., D.C., 1953); C & U Tank Lines, Inc.—Purchase —Comet Mtr. Exp. Co., 55 M.C.C. 791, 792 (Division 4, 1949); Friedman's Exp., Inc., Ext.—Naugatuck, Conn., 78 M.C.C. 644, 646 (Division 1, 1958); and Coastal Tank Lines, Inc. v. Pioneer Trucking Corp., 79 M.C.C. 101, 103 (Division 1, 1959).

[3] Interstate Commerce Act, § 207(a), 49 USC § 307(a).

[4] Dry flowable materials are non-liquid substances which by reason of being in granular, powdered, pellet, or grain form are thus capable of being poured into containers.

ficates. the particular containers are marketed by one of the plaintiffs, United States Rubber Company, who sell under the trade names of "Sealdtank", "Sealdrum" and "Sealdbin".[5] The common characteristic of these containers is their collapsibility when emptied. Collapsed rubber Sealdrums, designed for transportation of liquids in quantities ranging from 55 gallons to 1,000 gallons, occupy only 20% of their loaded size; collapsed rubber Sealdbins, designed for transportation of dry flowable commodities in quantities ranging from 70 cubic feet to 300 cubic feet, occupy about 11% of their loaded size; collapsed rubber Sealdtanks, designed for transportation of liquids in quantities ranging from 450 gallons to 4,000 gallons, occupy about 3% of their loaded size.[6]

Each of the 225 applicants in the proceedings before the ICC, including the 9 motor carrier plaintiffs, is the holder of a certificate of public convenience and necessity issued by the ICC under Section 208(a) of the Interstate Commerce Act, 49 USC § 308(a), authorizing regular-route, and in some cases irregular-route, transportation of general commodities. However, such previously-issued certificates contain certain expressed exceptions with respect to the general commodities authorized to be transported, including, typically, exceptions proscribing transportation of *"commodities in bulk"* and/or *"requiring special equipment."*

Two sets of hearings were held before two different Examiners of the Interstate Commerce Commission.[7] In

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[5] An additional C & S container type discussed in *Western Express* is the Nest-a-Bin, a product of Kaiser Industries. Other C & S containers were developed after taking of evidence in Western Express. 84 M.C.C. 587. Separate discussion of these particular containers is unnecessary.

[6] 84 M.C.C. at 614.

[7] The facts upon which the Commission acted in the challenged reports were not completely detailed, but the factual statements found by the two hearing Examiners from the evidence submitted

the 14 *Western Express* group of applications, Examiner Hagerty recommended the applicants, under their existing general commodities certificates, with the exceptions noted, had authority to transport liquid and dry commodities in the Sealdbin, the Sealdrum, and other containers here involved, but not in the Sealdtanks with capacities of 1,000 gallons or in excess thereof;[8] and, he also recommended denial of the 14 applications for authority to extend service because "the present and future public convenience and necessity do not require operations by applicants . . . of liquid and dry commodities as proposed."[9]

In the 211 *Best Way* group of applications, Examiner Pellerzi rejected the concept of *quantity* of commodities as irrelevant to the issue as to whether the shipment is "in bulk," and made recommendations which, in most important respects, were ultimately adopted by the Commission.[10] To be noted, Examiner Pellerzi concurred with Examiner Hagerty's recommendation public convenience and necessity were not shown to require additional service by applicants.[11]

Both groups of recommendations were appealed to the ICC, which sat *en banc* and held: 1. general commodity

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were also considered by the Commission in arriving as its decision. Such incorporation of factual statements by reference to the Examiners' reports has been held proper. Georgia Comm. v. United States, 288 U.S. 765, 771.

[8] Examiner Hagerty's Recommended Report, p. 24.

[9] Ibid.

[10] The chief variation of Examiner Pellerzi's recommendations from the Commission's rulings, discussed *infra*, were the former's conclusion that ordinary trailers equipped with *carrier-owned* C & S containers securely attached to the vehicle when offered for transportation were "special equipment" but not "bulk" equipment.

[11] Findings and Conclusions, Examiner Pellerzi, pp. 30-40, No. MCC-82 (sub-No. 5), et al.

carriers with restrictions against transportation of commodities in bulk or those requiring special equipment were authorized to transport loose, flowable, and fungible commodities when tendered in dismounted C & S containers (i.e., not placed or mounted on or in a vehicle), whether supplied by the carrier or shipper; 2. general commodity carriers, with the exceptions noted above, were not authorized to transport such commodities when tendered into a *premounted* C & S container; and 3. tank truck carriers [Intervenors] were authorized to transport such commodities whether tendered in a dismounted or premounted C & S container, and whether supplied by carrier or shipper. Plaintiffs' alternative demand for additional authorization allowing them to carry C & S containers if such authority did not already lie in plaintiffs, was also denied.[12]

The full Interstate Commerce Commission put its ideas this way:

(1) General commodity carriers' argument that the essence of bulk transportation was the pouring, pumping or direct dumping into the transporting vehicle of commodities "*in such a manner that the commodities transported are confined by and adopt the shape of the interior surface of such vehicle,*"[13] was rejected;

(2) Tank carriers' argument that the essence of bulk transportation was the *volume* of the commodity carried was similarly rejected;[14]

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[12] The Commission's considerations with respect to certificate construction is mainly contained in *Western Express;* its considerations with respect to additional authorization is contained in *Best Way.*

[13] Plaintiffs' Brief, p. 21; cf. Brief of Associated Transport, Inc., before the Commission, p. 3; Brief of American Trucking Co. before the Commission, p. 8.

[14] This position had been partially adopted by Examiner Hagerty in his Recommended Report, p. 24.

(3) The *type service* provided by a shipper was held determinative of whether it was a carrier of "commodities in bulk";

(4) Utilization of C & S containers was held "to blur the heretofore relatively clear distinction between the field of service of the general freight carrier and that of the carrier of bulk commodities . . .;" [15]

(5) The distinction "between packaged and bulk service" was held basic and "no justification" was held "shown for applying a different rule";[16]

(6) When a general commodity carrier fills a C & S container and then tenders it to a carrier utilizing ordinary trailer equipment, the basic ingredients of "package" service was held present; hence, the general carrier might transport the goods; finally,

(7) But ". . . when a shipper of fungible, flowable commodities tenders them loose and uncontained, that is, pours them into a C & S container which has been previously placed and mounted in or upon the carrier's vehicle, the transportation service involved must, we think, be considered beyond the scope of general-commodity authorizations restricted against the movement of commodities in bulk or those requiring the use of special equipment . . ." [17]

The Interstate Commerce Commission, *en banc*, denied reopening and reconsideration of the decisions in the Western Express and Best Way groups of cases.

Now, plaintiffs, here, seek a permanent injunction to issue against implementation of the ICC's orders, and argue: (1) Since shippers often fill their own containers, the Commission's decision is irrational, because it brings

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[15] 84 M.C.C. 600.

[16] 84 M.C.C. 601.

[17] 84 M.C.C. 601, 602.

about differing results to carriers who provide precisely the same *service* to shippers; (2) moreover, the ICC erred, as a matter of law, in concluding a carrier taking possession of a filled container receives tender of a commodity in bulk form; (3) the ICC erred in finding, as a fact, a shipper who provides a conventional trailer to transport a shipper's container provides the "practical equivalent" of a tank vehicle; (4) the ICC's findings of fact are inconsistent with their ultimate rulings of law; and (5) the ICC ignored the mandates of the National Transportation Policy.

1. That the scope of judicial review of decisions of the Interstate Commerce Commission is limited has been too long recognized in this district[18] and numerous cases in the Supreme Court[19] to require further articulation. E.g.,

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[18] Schenley Distillers Corp. v. United States, D. C. Del., 50 F. Supp. 491 (1943); Transamerican Frt. Lines v. United States, D. C. Del., 51 F. Supp. 405 (1943); Kansas City Leavenworth Tptn. Co. v. United States, D. C. Del., 51 F. Supp. 916 (1943); Casale v. United States, D. C. Del., 52 F. Supp. 1005 (1944), aff'd 321 U.S. 752; Schenley Distillers Corp. v. United States, D. C. Del., 61 F. Supp. 981 (1945), aff'd 326 U.S. 432; Seatrain Lines v. United States, D. C. Del., 64 F. Supp. 156 (1946), aff'd 329 U.S. 424; Great Northern Rwy. v. United States, D. C. Del., 81 F. Supp. 921 (1948), aff'd 331 U.S. 933; Acme Fast Freight v. United States, D. C. Del., 116 F. Supp. 97 (1953). Acme Fast Freight v. United States, D. C. Del., 146 F. Supp. 369 (1956); Seatrain Lines v. United States, D. C. Del., 152 F. Supp. 619 (1957), aff'd 355 U.S. 181; Luckenbach S.S. Co. v. United States, D. C. Del., 179 F. Supp. 605 (1959), aff'd 364 U.S. 280; North Carolina Nat. Gas Corp. v. United States, D. C. Del., 200 F. Supp. 745 (1961); Newton Trucking Co. v. United States, D. C. Del., 209 F. Supp. 600 (1962).

[19] United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535-36 (1946); Rochester Telephone Corp. v. United States, 307 U.S. 125, 138-40 (1939); Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934); Interstate Commerce Commission v. Union Pacific Railroad, 222 U.S. 541, 547-48 (1912); Illinois Central Railroad v. Interstate Commerce Commission, 206 U.S. 441, 454-55 (1907).

"The [Interstate Commerce] Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions of the industry which it regulates." *East Texas Lines* v. *Frozen Food Express,* 351 U.S. 49, 54.[20] "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the Commission." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, at 286-87. "[T]his court's function in matters of this nature is not to substitute its independent judgment for that of the Commission, for the Commission's discretition is to draw its conclusions from all the circumstances which occur in specific instances." *Acme Fast Freight* v. *United States,* D.C. Del., 146 F. Supp. 369, 372, 373.

The Supreme Court has kept the boundary-line dividing judicial and ICC functions a stark one, even when reversing a Commission judgment. For "it is the Commission, not the Courts, that brings an *expertise* to bear on the problem, that makes the findings, and that grants or denies the applications." *I.C.C.* v. *J-T Transport Co.,* 368 U.S. 81, at 93. But, judicial deference to the ICC's administrative findings is not boundless. "[*E*]*xpertise* is not sufficient by itself. Findings supported by substantial evidence are required . . ." *I.C.C.* v. *J-T Transport Co., supra.*[21]

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[20] Cf. Newton Trucking Co. v. United States, D. C. Del., 209 F. Supp. 600.

[21] The most recent Supreme Court articulation of these principles states:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion.' New York v. United States, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' Federal Com-

Determination of whether the ICC's construction of the outstanding certificates and the statute here involved is unreasonable, must rest, at bottom, on the rationality of the application of its findings of fact[22] and to its ultimate rulings of law.

2. Plaintiffs, in fact, limit their complaint to the situation where the container is shipper-supplied and where the carrier provides neither loading nor unloading services, but merely transports the shipper's container in ordinary vehicles. The fact-inference which the ICC drew from this evidence was "the aggregate of facilities provided constitutes a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle." This was a legitimate inference—one within its particular competence as a trier of the facts. As posed by the ICC, the final issue in these proceedings was one of analogy: *e.g.*, were the C & S

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munications Comm'n. v. RCA Communications, Inc., 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare *id.*, at 91. And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. Interstate Commerce Comm'n v. J-T Transport Company, 368 U.S. 81, 93; . . ." Burlington Truck Lines v. United States, 31 LW 4023, 4026.

[22] Plaintiffs do not contest the Commission's findings of detailed facts. Pl. Proposed Findings, p. 17. It is the function of the Commission, not only to find the facts, but also to draw legitimate inferences from those facts. I.C.C. v. Union Pacific R. Co., 222 U.S. 541, 547; Western Paper Makers Chemical Co. v. U.S., 271 U.S. 268, 270-71; Merchants Warehouse Co. v. U.S., 283 U.S. 501, 508; U.S. v. Pan American Petroleum, 304 U.S. 156, 158; Transamerican Freight Lines v. U.S., D.C. Del., 51 F. Supp. 405, 410; Acme Fast Freight v. U.S., D.C. Del., 146 F. Supp. 369, 372-73.

containers closer to packages or to tanks.[23] So stated, the holding the containers were package-like when *treated as packages* (i.e., tendered to and received from the carrier *when filled*) is unexceptionable. Plaintiffs argue, however, that the "package" concept itself is irrelevant because "all the carrier is providing is a conventional truck" and "a conventional truck may not be temporarily converted into a tank truck merely by using it to transport a container."[24]

Nonetheless, we conclude such temporary conversion may occur for the two cogent reasons stated by the ICC:

> ". . . First, by being able to tender its fungible, flowable commodities, minus packaging of any type beforehand, the shipper is being provided an essential element of bulk transportation which has not been available from general freight carriers in the past. Secondly, when a C & S container is placed or mounted upon a vehicle so that a fungible, flowable commodity may be poured, pumped, dumped, et cetera, into such container, the aggregate of facilities provided constitutes a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle; and, like such vehicles, the unit in question clearly falls within the category of 'special equipment'."[25]

General carriers, we recognize, perform the same physical act when they transport a sack of grain preloaded by the shipper or transport a premounted Sealdbin container of grain subsequently loaded by the shipper. But, the ICC's holding that service provided to shippers becomes substantively different because of the new elements of post-loading packaging of fungible, flowable commodities traditionally

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[23] Plaintiffs' claim that to so state the issue is to ignore the statutory command that operating rights may not be "taken" except under § 212(a) of the Act, begs the question. If plaintiffs did not have the certificate authorization claimed, the decision of the Commission does not "*take*" any existing rights.

[24] Plaintiffs' Brief, p. 25.

[25] 84 M.C.C. 602.

carried by bulk carriers is convincing. There is little if any distinction, as Examiner Hagerty phrased it, "from a practical point of view and transportationwise between the tank truck and a flat bed trailer upon which is mounted a Sealdbin filled with liquid."[26] It is apparent "when . . . a [Sealdtank] is mounted on or in a motor vehicle, it assumes all of the aspects and attributes of a tank vehicle, providing a facility exactly comparable to a motor tank truck and has the exact utility of such a vehicle. Differently stated, the Sealdtank when mounted on a vehicle becomes a medium of transportation of the type specially adopted for service by the tank truck operators."[27] Where all the carrier does is to provide an otherwise ordinary truck for transportation of goods and does no loading or unloading of the truck, the totality of facts may still result in the denial to him of the opportunity to transport goods.[28] The grant of author-

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[26] Examiner Hagerty's Recommended Report, p. 14.

[27] Examiner Hagerty's Recommended Report, p. 23.

[28] The Commission has previously held that where similar functions were performed by two units of transportation one might be the "practical equivalent" of the other and thus require similar legal treatment. Definition of Tank Cars, 104 I.C.C. 196, 201 (1925); P. B. Mutrie Motor Tptn. Co. Ext.—Benzyl Chloride, 83 M.C.C. 123, 133 (1960). Other decisions of the Commission have limited the "special equipment" category to situations where the carrier provided something more than an ordinary vehicle and ordinary over-the-road transportation. St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling, 53 M.C.C. 277 (1951); W. J. Dillner Transfer Company—Investigation of Operations, 79 M.C.C. 335 (1959), and Dallas & Mavis Forwarding Co., Inc., Extension—Galion, Ohio, 79 M.C.C. 285 (1959). The Commission is firmly bound by neither line of decision and "This Court has no concern . . . with the alleged inconsistency with the findings made in other proceedings before [the Commission]." Brandeis, J., Virginian Rwy. Co. v. United States, 272 U.S. 658, 665, 666.

Mr. Justice Jackson's statement with respect to a major change of FCC policy is apposite. "The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this

ity to a carrier is not a *carte blanche*, limited solely by the determination of whether shipper or carrier loads the vehicle. A general carrier, for example, who wishes to offer his vehicle for transportation of explosives, to be loaded and unloaded by the shipper, is denied legal opportunity by his certificate.[29] Too, the carrier who wishes, for example, to offer his vehicle for transportation of stolen goods, to be loaded and unloaded solely by the shipper, is denied that opportunity by the general state and federal statutes.[30] A rule of law often imposes upon parties different consequences for the commission of the same physical act.

We find, as a judgment of independent legal significance, the *package-tank differentiation* as found by the ICC rational, and its application reasonable to the facts as found by the Interstate Commerce Commission *en banc* and its two Examiners.

3. Other objections of the general commodity carriers to the reasonableness of the ICC's findings with respect to certificate interpretation are also without foundation. Plaintiffs argue, *e.g.*, the ICC committed a "glaring mistake of law"[31] in finding a carrier taking possession of a filled

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case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable." Fed. Comm. Comm. v. WOKO, 329 U.S. 223, 227-228. Cf. Western Paper Makers' Chemical Corp. v. United States, 271 U.S. 268, 271; Georgia Public Service Comm. v. United States, 283 U.S. 765, 775; Northern Pacific Ry. Co. v. United States, D.C. Minn., 41 F. Supp. 439, 446, aff'd. 316 U.S. 346; M. & M. Tptn. Co. v. United States, D.C. Mass., 128 F. Supp. 296, 301 aff'd. 350 U.S. 857; ABC Frt. Fwdg. Corp. v. United States, S.D.N.Y., 169 F. Supp. 403, 405; Allen v. United States, S.D. Fla., 187 F. Supp. 625, 627; and Ace Lines, Inc. v. United States, S.D . Ia., 197 F. Supp. 591, 599.

[29] See n. 2, supra.

[30] 11 Del. C. § 631; 18 USC § 2314.

[31] The alleged error is referred to "incidental . . . but erroneous." Pl. Brief, p. 21.

container receives "tender" of a commodity in bulk form. Maybe the ICC's use of the word "tender" was less than felicitious, yet it did state the use of the word was limited to the "type of motor service provided rather than determining when legal responsibility for the security of property shifts from the owner of the lading to the transporter, or vice versa."[32] Cases cited in the field of bailments to indicate the nature of the Commission's alleged error are thus inapposite. At worst, the ICC's semantic difficulties should not be decisive of the present litigation.

4. Unlike the issue of certificate interpretation, plaintiffs' broader extension-of-service applications provoked no disagreement between the two Examiners who ruled on the applications; and none of the Commissioners of the ICC dissented from its final judgment on this point. Both Examiners and every participating Commissioner[33] concluded plaintiffs had not met the burden of proving that "the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity."[34] The ICC found "a definite prospective need on the part of the shipping public for motor common carrier transportation of flowable, fungible commodities in C & S containers;"[35] and the "vast majority of tank truck protestants [intervening defendants] do not operate the conventional or flat-bed equipment necessary for the efficient transportation of C & S container

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[32] 84 M.C.C. 600, n. 6.

[33] Two Commissioners did not participate. The two Commissioners who dissented from *Western Express* noted that their "approval of the report is predicated solely upon the view that the majority holdings in the *Western Express* case now represent the law on the subject, although the conclusions in the dissent . . . in [Western Express] continue to represent [our] interpretation of what the rights of general commodity carriers should be." 86 M.C.C. 77.

[34] § 207(a) Interstate Commerce Act, 49 USC 307(a).

[35] 86 M.C.C. 75.

traffic;"[36] also, "with few exceptions [existing carriers] have published tariff minima of 4,000 gallons or 28,000 pounds applicable to their transportation of less-than-truckload quantities of authorized commodities;"[37] and finally, tank truckers do not have the benefit of return pay loads in their operations.[38] Plaintiffs believe these findings are inconsistent with denial of their applications.

We disagree. Findings of a *prospective* need on the part of the shipping public for utilization of C & S containers is not inconsistent with a finding tank carriers do not *presently* utilize equipment required for transportation of C & S containers—if tank carriers can and will meet the prospective need found by the ICC.[39] On the record available to us, we cannot conclude tank carriers are either unwilling or unable to meet that need. The ICC statement is obviously sufficient that—

> "Although the tank truck protestants as a group has not thus far engaged any substantial transportation of commodities tendered into premounted C & S containers, they express a willingness and ability to do so, and their right to do so is explicitly affirmed in the Western Express case. Moreover, generally the supporting shippers admittedly have not requested this type of service from the protestant carriers."[40]

Plaintiffs' argument about the findings of the ICC as to published tariff minima of the tank truck protestants being

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[36] 86 M.C.C. 73.

[37] Ibid.

[38] Ibid.

[39] Plaintiffs' cited cases indicate only that *present* ability to meet a shipping need is *one* factor to be considered in determining whether a certificate should issue pursuant to § 207(a) of the Act. See, Hayes Freight Lines, Inc., Extension—Texas, 77 M.C.C.233, 238 (1958); Lahn Transportation Extension—Williamstown Junction, Docket No. MC-75527 suz 13 (not reported in full); Diamond Transp. System, Inc., Extension—Rockford, Ill., 68 M.C.C. 390, 392 (1956); Wamsley Extension—New England, 71 M.C.C. 13, 15 (1957).

[40] 86 M.C.C. 75, 76.

inconsistent with its ultimate holdings, is likewise unconvincing. For a long time shippers have had statutory remedies to determine if rates of tank truckers are unreasonably high.[41] Tank truckers may lower their tariff minima pursuant to specific provisions of the Interstate Commerce Act.[42] While the current high tariff minima of tank truckers may presently limit the usefulness of the C & S containers, we are not now prepared to find the tank truck industry will renege from its "unequivocal willingness . . . to satisfy shippers' needs."[43] Should tank truckers do so, new proceedings under §§ 206(a) and 207(a) of the Act might be received with more favor by the ICC or by a reviewing Court.[44]

5. Plaintiffs' final argument is that at no place in either of the ICC's decisions, is reference made to the National Transportation Policy[45] or articulation made that the man-

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[41] § 216(e) ICA, 49 USC 316(e).

[42] § 217(c) ICA, 49 USC 317(c).

[43] Brief, Intervening Defendants, pp. 30, 31.

[44] These same considerations are applicable to plaintiffs' claims with respect to the Commission findings re dead-head mileage of tank carrier protestants.

[45] Congress' statement of policy is concise:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;* . . .—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United Stattes, the postal service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899, 49 USC [preceding] § 1.

dates of the statute were being followed. While specific reference to "the policy" is unnecessary,[46] recent Supreme Court decisions admonish if the ICC's findings "do not provide [the] Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside . . ." *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 92.[47]

The key words of the Act orders those charged with administering the statute "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers." Dissenting Commissioner Webb in *Western Express* thought the ICC had made its choice "without reference to the provisions of the declared national transportation policy."[48] We think he was wrong. The ICC's position is apparent in its statement with respect to its power to grant new operating rights:[49] "We have no power to issue any operating rights except in accordance with the

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[46] We concur with Judge Augustus Hand's conclusion, "It is clear that this expressed policy must serve as a guide to the Commission in all its decisions. However, it seems equally clear that the Commission cannot and should not be required to discuss each consideration expressed in the National Tranportation Policy in every decision it renders. '[T]he findings essential to the validity of a given order will vary with the statutory authority invoked and the content of the situation presented.' It is only necessary, that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function . . ." Luckenbach S. S. Co., Inc. v. United States, S.D.N.Y., 122 F. Supp. 824, aff'd 347 U.S. 984 (1954).

[47] Cf. ICC v. J-T Transport Co., 368 U.S. 81, 91-2.

[48] 84 M.C.C. 606.

[49] That the Commission was less oblivious than plaintiffs suggest to the *existence* of a national transportation policy may be noted by its specific reference to the policy in the text of *Western Express,* 84 M.C.C. 590.

standards of Section 207 of the Act. These standards are basically designed to protect established carriers against the institution of any competing services, unless the established carriers are unable or unwilling to respond to a distinct public need for the new services proposed. Obviously, no carrier or group of carriers is entitled to blanket insulation from new competition—especially where such competition results largely from development of or refinement of the tools of transportation—; but, manifestly, fairness requires that no *carte blanche* authorization be granted which would permit applicants to invade the established field of service of the bulk motor carriers whenever or wherever it is to their advantage."[50]

It is manifest the ICC more than met the statutory requirement of a declared national transportation policy. The Commission's sometimes implicit balancing of factors to be observed and weighed under the National Policy may not be to plaintiffs' liking; the Commission's failure to make more explicit each consideration that may have influenced it cannot be said to have provided this Court with as total a record as might have been desirable.[51] Yet the record is sufficient. In *Schaffer, supra,* where the record was deficient, Chief Justice Warren wrote: "The record here does not disclose the factors the Commission compared in concluding that existing rail service is 'reason-

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[50] 85 M.C.C. 75.

[51] Justice Frankfurter's admonition [although dissenting] in *Schaffer* is apposite:

> "It is, however, pertinent to add that the Court's decision may serve a useful purpose if it will lead the Interstate Commerce Commission, despite its enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's actions." 355 U.S. 83, 95.

ably adequate.' For example, the Commission has not determined whether there are benefits that motor service would provide which are not now being provided by the rail carriers, whether certification of a motor carrier would be 'unduly prejudicial' to the existing carriers, and whether on balance the public interest would be better served by additional competitive service."[52] Under the particular facts in the case at bar, however, we think the ICC has given consideration to all the factors just quoted. Moreover, no substantial aid would have benefitted this Court had the Commission directly verbalized what it clearly implied—that though present use of the new C & S containers might be curtailed by the decision this might be necessary to presently protect tank carriers. Nor would this Court have been assisted had the Commission stated specifically that though "more economical . . . . service" might be provided by granting general carriers the authorization requested, "sound economic conditions" in the transportation industry might be destroyed.

In short, it is not for this Court to issue a mandate to the ICC, in returning the case for further procedural findings, to state with Einsteinian exactness how much of a contribution the new rubber containers made to the transportation field. Neither should the ICC be required to measure in dollars and cents damage that might be done to tank truckers if general carriers are here granted free rein to utilize the new technological device at this time. Additional words of the Commission in these amorphous areas would add length but not weight to the decision.

Any sophisticated review suggests the ICC decision was palpably a compromise;[53] it was an attempt to insure, for

[52] 355 U.S. 83, 90.

[53] No air of sacrosanctity thereupon envelops the decision; if anything, the decision becomes more subject to careful judicial scrutiny to insure the Commission properly "performed its function." See, n. 45, supra.

the present, that both general and tank carriers should continue to persevere in healthy competition. The ICC took the broad look—a look we find convincing. We think we have been told enough; the decision may suggest debate, but we do not think it reversible either as a matter of fact or law.

6. The permanent injunction sought by plaintiffs will be denied and the complaint dismissed, because the conclusions of the ICC as to interpretation and public convenience and necessity [and, "National Transportation Policy"] have a rational basis and are consistent with the findings from the evidence submitted by the parties.

Orders may be submitted.*

WRIGHT, *District Judge*, dissenting.

I respectfully dissent from the learned opinion of the majority of the Court on the narrow but neyertheless crucial issue of whether or not the Commission has considered and properly applied the National Transportation Policy.[1]

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* The opinion herein incorporates such findings and conclusions as are required by FR 52.

[1] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national

In this posture a reviewing court at the outset is faced with three basic legal problems involving the Congressional dictate:

> (1) To what extent, if at all, the Commission must consider the transportation policy in interpretative proceedings as distinguished from the ordinary Section 207 applications for authority;
>
> (2) how explicit the ICC must be in its consideration of the Congressional objectives; and
>
> (3) to what extent a court should review the Commission's holdings on policy issues.[2]

Generally solution rests in the language and holdings of the Supreme Court, and specifically in the Court's mandate as expressed in *Schaffer Transp. Co.* v. *U. S.*[3]

Before Schaffer, the importance of the Congressional policies in Commission decisions had been emphasized. For example, three years after the Act's passage, the Supreme Court, in a case involving the legality of a pro-

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defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899 (1940), 49 U.S.C.A. Sec. 301 note.

The declaration as it appeared was identical to the declaration in the Motor Carrier Act of 1935. The latter was primarily directed towards the prevention, as was the case with so much other New Deal legislation, of ruinous competition. See W. K. Jones, Antitrust and Economic Regulation: An Introduction to Comparative Analysis, 19 A.B.A. Antitrust Section, 261, 279-99. However, a reading of the National Transportation Policy would seem to indicate that Congress had other important goals beside the prevention of cutthroat competition in mind and the Supreme Court has so held. See infra.

[2] The scope of Court review and the duties of the Commission are, of course, intertwined concepts. They stand in direct relation —i.e., the broader the duty the broader the scope.

[3] 355 U.S. 83 (1957).

posed consolidation of truckers,[4] said the National Transportation Policy "is the Commission's guide to the 'public interest' * * *."[5] Mr. Justice Rutledge, speaking for the Court, also noted that the ICC's power to grant immunity under the antitrust laws in "no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the light of the objectives of the national transportation policy."[6] In a case involving the legality of rates,[7] the Court said "it [the ICC] was charged not only with seeing that rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the national transportation policy * * *."[8] And, in several cases,[9] the Commission was admonished to give careful consideration to that part of the National Transportation Policy that sought to preserve the inherent advantages of the different modes of transportation.

The issue before the Supreme Court in Schaffer was "whether the Interstate Commerce Commission adequately and correctly applied the standards of the National Transportation Policy in denying a motor carrier's application to provide service between points served exclusively by rail."[10] The Court, speaking through Chief Justice Warren, held the ICC delict in that the latter failed to evaluate the critical factor of inherent advantages of the modes of transportation. The majority while conceding

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[4] McLean Trucking Co. v. United States, 321, U.S. 67 (1944).

[5] 321 U.S. at 82.

[6] 321 U.S. at 87.

[7] Eastern-Central Motor Carriers Assoc. v. United States, 321 U.S. 194 (1944).

[8] 321 U.S. at 206.

[9] Dixie Carriers, Inc. v. United States, 351 U.S. 56 (1956); ICC v. Mechling, 330 U.S. 567 (1947).

[10] 355 U.S. at 84-85.

the Commission has wide discretion in deciding whether the public interest warrants a particular service, specifically pointed out "that discretion must be exercised in conformity with the declared policies of Congress."[11] The Court then pointed up the role of the reviewing court:

> "To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we should overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation has been made in accordance with the mandate of Congress."[12]

The Court then proceeded to specifically point out the defects in the Commission's opinion and proceedings. The ICC had cast its first principal conclusion in terms of adequacy of service. While this conclusion was relevant, it was defective because "[T]he record here does not disclose the factors the Commission compared in concluding that existing rail service is 'reasonably adequate.'"[13]

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[11] 355 U.S. at 88.

[12] 355 U.S. at 88.

[13] 355 U.S. at 90. At this point, the Court continued, saying:

> "For example, the Commission has not determined whether there are benefits that motor service would provide which are not now being provided by the rail carriers, whether certification of a motor carrier would be 'unduly prejudicial' to the existing carriers, and whether on balance the public interest would be better served by additional competitive service."

The majority treats this language as the "standard" of Schaffer. This seems to me to be only an exemplification of a broader principle, i.e., that the ICC must make findings, formal or otherwise, which allow the courts to see that the Commission's opinion comports with the National Transportation Policy.

Clearly, to reject the application on this ground alone would be to fatally disregard relevant portions of the Declaration of Policy, and this alone warrants reversal.[14] The ICC's second basic conclusion was that witnesses mainly supported the application to obtain reduced rates. Thus, their testimony was disregarded. The Court concluded that this approach runs counter to the National Transportation Policy; lower rates are "precisely the sort of 'inherent advantage' * * *" that the Congress requires the Commission to recognize.[15] In short, the Court reversed because the ICC failed to consider an inherent advantage (lower rates) of the applicant's service and because the findings on adequacy were insufficient to allow the Court to measure the ICC's opinion against the yardstick of the National Transportation Policy.[16]

The Supreme Court concluded with this admonition:

> "We do not minimize the complexity of the task the Commission faces in evaluating and balancing the numerous considerations that collectively determine where the public interest lies in a particular situation. And we do not suggest that the National Transportation Policy is a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary, those principles overlap and may conflict, and, where this occurs, resolution is the task of the agency that is expert in the field. But there is here no indication in the Commission's findings of a conflict of policies. Shippers and receivers now served exclusively by rail have testified to the advantages they would gain from a proposed motor carrier service. There is no finding that the authorization of the proposed service would impair the sound operation of the carriers already certificated. Nor has the Commission properly evaluated the advantages urged by the supporting witnesses to determine whether the

[14] See 355 U.S. at 91.

[15] 355 U.S. at 91.

[16] See 355 U.S. at 92.

standard of public convenience and necessity has been met.''[17]

It is abundantly clear under Schaffer that not only must the Commission consider the National Transportation Policy in its proceedings,[18] but more than that, it cannot ignore any part of the policy which is operative by reason of the factual pattern of the particular case.[19] The Commission must make findings, formal or otherwise, that will allow a reviewing court to see that the ICC decision comports with the Congressional obpectives.[20] ''Deference to expertise'' still exists as to most issues,[21] but when the National Transportation Policy is involved deference is contracted—scope of review expanded. The Courts must not only see that the ICC has performed its duties but may also substitute its judgment with a slightly freer hand when

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[17] 355 U.S. at 92.

[18] This is also clear from the Court's stress in such proceedings as rate-making, certification, and consolidation and follows inexorably from the last sentence of the Preamble.

[19] See text accompanying notes 15 and 17.

[20] The federal courts should not substitute its wisdom for that of the Congress. Basically, it should apply principles neutrally. Cf. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). However, the importance of ensuring explicitness on the ICC's part cannot be underestimated. In this way, the Congress and the public will clearly see the nature of the Interstate Commerce Act. And, if they wish, the Act could be repealed or affirmed. This, of course, would not or would be unlikely to occur if the policies were hidden by an ambivalent cloud.

[21] One wonders whether this time-worn concept is in need of critical reexamination. In a tentative draft for the Administrative Conference, entitled Licensing of Truck Operations by the Interstate Commerce Commission, Professor W. K. Jones of the Columbia Law School discusses the tremendous workload of the ICC. In 1960, 4,482 application cases were closed. The time for each case ranged from an average of 5.5 months (for dismissal prior to examiner's action) to 31.7 month (for reopened cases). This Court cannot completely set out data on the efficiency of the ICC. But, the type of information I have noted above should make the courts ponder the Commission's expertise.

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the broad, judicially definable, standards of the Preamble are in play.[22]

The ICC was under a duty to consider and apply the National Transportation Policy in this type of interpretative proceeding—i.e., the Commission had this affirmative duty in Western Express. The cases under review involve two opposing segments of a highly competitive although regulated industry. Commodities formerly manufactured so as to be transported only in containers of one kind or another are now shipped in bulk. Many fungible, flowable commodities heretofore movable only in tank trucks or tank cars can now be transported in conventional flat-bed trucks through the use of sealed tanks or similar collapsible containers. The economic impact of these new technological developments may seriously affect vital elements of our transportation system. Another result may well be reduction in transportation costs of many and varied commodities heretofore easily categorized as transportable only by common carriers on conventional truck beds or by special carriers in tank trucks.

The economic importance of this case makes it clear that the mere reading of the words in the certificate of the parties is not enough. To do so would be contrary to the spirit of the Congressional mandate that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."[23] Added emphasis, if needed, is supplied by reference to the numerous Supreme Court decisions stressing the applicability of the National Transportation Policy in many diverse proceedings.[24]

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[22] This is the tenor of Chief Justice Warren's opinion.

[23] This is the last sentence of the National Transportation Policy which is set out in footnote one of this opinion.

[24] The correctness of these conclusions are admitted by the Commission. See Joint Brief for the United States of America and the ICC, p. 39, Roadway Express, Inc. v. United States. It therein states that:

> "Of course, the Commission must take cognizance of all the elements and factors embraced in the National Transpor-

The operative facts as gleaned from the evidence in *Best Way* and *Western Express* call into play several elements of the National Transportation Policy. Unrestricted use of the C & S containers by the general commodity carriers will divert business from the tanktruckers;[25] here, the clause—"foster sound economic conditions in transportation"—is relevant. These words have been interpreted as protecting established carriers against ruinous competition and indeed, this is what Congress had in mind.[26] Intertwined with the evidence that amply established public need were facts that at distances of 400 miles or more the rate structure of the general freight carrier results in lower costs to the shipper.[27] The tank carrier rate structure reflects a high incidence of empty return mileage. Under the Supreme Court decision in *I.C.C.* v. *J-T Transport Co.*,[28] the relative rate structures are a factor to be considered under the "economical * * * service" portion of the National Transportation Policy.[29] C & S containers only can be used efficiently on flat-bed trucks.[30] The tanktruckers will have to buy flat-bed trucks to supply the serv-

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tation Policy, before rendering decisions of the importance of those involved in the *Western Express* and *Best Way* groups of cases. The last sentence of that Policy specifically provides for such administration by the Commission."

To be sure, if the issue was whether peanut oil is a vegetable, a different problem would be presented.

[25] See e.g. 84 M.C.C. 595-597.

[26] See note 1, supra.

[27] See 84 M.C.C. 595; 86 M.C.C. 70, 71, 73.

[28] 368 U.S. 81 (1961).

[29] See 368 U.S. at 91-92. The Court, talking in a slightly different context, said: "* * * contract carriage may be more 'economical' than common carriage by motor or rail within the framework of the national transportation policy, as it is defined in the Act—'the Commission's guide' to the public interest."

[30] 86 M.C.C. 73.

ice.[31] This would still leave them in the anomalous position of being at a deadhaul disadvantage. Their certificates would only allow them use of flat-bed trucks (it should be noted that these vehicles will represent a substantial investment) for a very limited purpose. These facts are in the record. They call into operation the "economical and efficient service" element of the policy.[32] Some of these considerations lead to one result in *Western Express;* some to another.

In seeking to determine whether the Commission has considered and evaluated all portions of the policy by reason of the facts, I find little comfort in the ICC's discussions and findings. These were the ICC's basic conclusions:[33] 1) there is a distinct public need for shipment by C & S containers; 2) by reason of its decisions general commodity carriers will have an opportnuity to generate a substantial amount of traffic; 3) tanktruckers, who aver

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[31] 86 M.C.C. 73; 84 M.C.C. 596-597.

[32] While this portion of the National Transportation Policy has not been emphasized as much as others, it is clear that these facts fall within the literal intent of these words. Surely, no court should imply that Congress windowdresses; by using the above phrase it must have intended that these facts be considered.

[33] This member of the court will read both opinions—*Best Way* and *Western Express*—together. I do this because the ICC "adopted" *Western Express* in *Best Way* and because the two are challenged together in the proceeding before this court. It should be noted, however, that the ICC's basic conclusions with reference to the National Transportation Policy, appear in *Best Way*. The decision in *Western Express* may be summarized as no reason appears to justify "applying a different rule [for differentiating between the two types of service] or for establishing, arbitrarily, a new one • • •." 84 M.C.C. at 600. There are several justifications for reading the opinions separately. They were decided a month apart and there is no explicit indication that the ICC intended its reasoning in *Best Way* to apply to *Western*. If the cases were treated *Western Express* would be barren of any consideration of the separately *Western Express* would be barren of any consideration of the policy.

they are ready, willing and able to supply the service, should get the first chance lest a serious impairment of their capital structure occur; and 4) apart from their concern over the deadhaul factor, shippers express no material dissatisfaction over the present service.

At worst, the ICC has ignored certain relevant portions of the National Transportation Policy. It is reasonable to conclude that the Commission has failed to evaluate the rate factor and others under the "economical and efficient service" heading. At best, though conflict is apparent and decision may be contrary to the public interest, it is extremely difficult, if not impossible, to follow the ICC's reasoning. Both alternatives justify reversal.

It is my view that in a case of this importance it must be clear, perhaps to the point of explicitness, that the ICC has considered, weighed, resolved and reasoned to a result consistent with the national Transportation Policy. The majority would rely to a great extent on what they believe to be implicit in the opinion to find the requisite consideration; their rule is a concomitant of the "deference to expertise" notion. It is my considered judgment that a reviewing court should be able to confidently ascertain that, in the words of Mr. Justice Rutledge,[34] the "guide to the public interest" was *reasonably* followed.

I would remand to the ICC to allow it to reconsider its interpretations of the certificate exceptions "commodities in bulk" and "requiring special equipment" and to allow it to reconsider and articulate its reasoning relative to the National Transportation Policy.[35]

At Wilmington,
Dated: January 21, 1963.

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[34] See note 5, supra.

[35] Both cases would be remanded in their entirety since a different interpretation of the certificates could render the Section 207 applications moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 2419

ROADWAY EXPRESS, INC., ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

NATIONAL TANK TRUCK CARRIERS, INC., ET AL.,
Intervening Defendants.

Final Judgment and Decree

The above-entitled action having come on for hearing on the merits on July 9, 1962, before a duly constituted District Court of three Judges pursuant to Sections 2284(1) and 2325 of Title 28, United States Code, with all parties represented by counsel; and the Court having considered the pleadings, the evidence adduced before the Interstate Commerce Commission, and the briefs, and having heard the oral arguments of counsel, and the Court being fully advised in the premises; and the Court, in a majority opinion, incorporating such findings and conclusions as are required by FR 52, having concluded that the relief prayed for should be denied and that the complaint should be dismissed; it is hereby

ORDERED, ADJUDGED AND DECREED that the relief prayed for in the complaint be, and it is hereby, denied and that the complaint be, and it is hereby, dismissed; and

IT IS FURTHER ORDERED that the Clerk be, and he is hereby, directed to enter this final judgment and decree forthwith.

This 4th day of February, 1963.

(s) JOHN BIGGS, JR.
John Biggs, Jr.,
Chief Circuit Judge

(s) PAUL LEAHY
Paul Leahy,
Senior District Judge

Approved as to form:

(s) JOHN C. BRADLEY
(s) GEORGE TYLER COULSON
Attorneys for Plaintiffs

(s) ALEXANDER GREENFELD
United States Attorney

(s) JOHN H. D. WIGGER
Attorney
Department of Justice

I. K. HAY
Associate General Counsel
Interstate Commerce Commission

Attorneys for Defendants

(s) LEONARD A. JASKIEWICZ
(s) H. JAMES CONAWAY, JR.
Attorneys for Intervening Defendants

APPENDIX C

M-10331

INTERSTATE COMMERCE COMMISSION

No. MC-8902 (Sub-No. 12)[1]

THE WESTERN EXPRESS COMPANY EXTENSION—SEALDTANKS

Decided March 22, 1961

Certificates of public convenience and necessity authorizing transportation of general commodities, with certain exceptions, interpreted. Applications dismissed in part and denied in part.

George N. Plavic for applicant in No. MC-8902 (Sub-No. 12).

John C. Bradley, Drew L. Carraway, John S. Fessenden, W. O. Turney, Linwood C. Major, Guy H. Postell, Roland

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[1] This report also embraces No. MC-112713 (Sub-No. 82), Yellow Transit Freight Lines, Inc., Extension—Sealdtanks; No. MC-29120 (Sub-No. 56), Wilson Storage and Transfer Co. Extension—Sealdtank; No. MC-59852 (Sub-No. 11), All States Freight, Inc., Extension—Sealdtanks; No. MC-2202 (Sub-No. 173), Roadway Express, Inc., Extension—Sealdtanks; No. MC-74721 (Sub-No. 69), Motor Cargo, Inc., Extension—Sealdtanks; No. MC-111231 (Sub-No. 38), Jones Truck Lines, Inc., Extension—Sealdtanks; No. MC-69274 (Sub-No. 4), M. & R. Transportation Co., Inc., Extension—Sealdtanks; No. MC-2229 (Sub-No. 97), Red Ball Motor Fregiht, Inc., Extension—Sealdtanks; No. MC-105265 (Sub-No. 42), Denver-Amarillo Red Ball Motor Freight, Inc., Extension—Sealdtanks, now renumbered and reentitled No. MC-2229 (Sub-No. 103), Red Ball Motor Freight, Inc., Extension—Sealdtanks; No. MC-64650 (Sub-No. 16), W. T. Cowan, Inc., Extension—Sealdtanks; No. MC-29566 (Sub-No. 59), Southwest Freight Lines, Inc., Extension—Sealdtanks; No. MC-46280 (Sub-No. 40), Darling Freight, Inc., Extension—Sealdtanks; and No. MC-22229 (Sub-No. 27), Terminal Transport Company, Inc., Extension—Sealdtanks.

Rice, Rex Eames, and *Blair Moody, Jr.*, for applicants in Nos. MC-8902 (Sub-No. 12), MC-59852 (Sub-No. 11), MC-105265 (Sub-No. 42), which is now renumbered MC-2229 (Sub-No. 103), MC-64650 (Sub-No. 16), MC-2229 (Sub-No. 97), MC-29120 (Sub-No. 56), MC-112713 (Sub-No. 82), MC-2202 (Sub-No. 173), MC-7421 (Sub-No. 69), MC-69274 (Sub-No. 4), MC-46280 (Sub-No. 40), and MC-22229 (Sub-No. 27).

John C. Bradley, Roland Rice, and *B. J. Wiseman* for applicant in No. MC-111231 (Sub-No. 38).

Rueben G. Crimm and *B. C. Kinney* for applicant in No. MC-22229 (Sub-No. 27).

J. W. Stevens for applicant in No. MC-64650 (Sub-No. 16).

James F. Neal for applicants in Nos. MC-74721 (Sub-No. 69), MC-2202 (Sub-No. 173), and MC-69274 (Sub-No. 4).

Thomas N. Dowd for applicant in No. MC-29566 (Sub-No. 59).

Gerald A. Orscheln, James E. Lesh, Cecil H. Davis, Charles B. Myers, James E. Wilson, John C. Bradley, Drew L. Carraway, Ross W. Bennington, Charles J. Braun, Jr., Martin L. Hoffman, Roland Rice, Robert N. Burchmore, John S. Burchmore, Albert B. Rosenbaum, R. Edwin Brady, G. M. Rebman, and *John F. Murphy* for interveners in support of applicants.

Jack B. Josselson for intervener as its interest may appear.

William T. Croft, Daniel B. Johnson, Frank B. Hand, Jr., Harry C. Ames, Jr., Wilmer B. Hill, Paul J. Keeler, Arthur P. Boynton, J. D. Fetz, David Orlin, Edwin C. Reminger, C. Austin Sutherland, Jo E. Shaw, Harold R. Ainsworth, Richard Gleaves, Walter Caven, Austin L. Hatchell, Donald E. Freeman, Dale C. Dillon, Nuel D. Belnap, Richard J. Hardy, Alvin J. Meiklejohn, Jr., Bert Collins, Paul F. Barnes, Clay R. Moore, Howell Ellis, Leonard A. Jaskiewicz, J. P. Welsh, Carl S. Clark, Edward G. Bazelon, Charles T.

Dodrill, James W. Nisbet, F. X. Masterson, Benjamin J. Brooks, Peter A. Cooper, V. Baker Smith, Charles W. Singer, Sol H. Proctor, Dale Woodall, T. H. Burk, Marion F. Jones, R. J. Reynolds, Jr., Henry L. Fabritz, David P. Wood, Paul F. Barnes, Harold E. Spencer, Harold G. Hernly, Ed White, Robert J. Bernard, J. Edgar McDonald, Richard J. Murphy, Ewell H. Muse, Jr., John R. Mahony, Wilhelmina Boersma, James G. Lane, and *Ray M. Van Hook* for protestants and interveners in opposition.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

These applications involve related issues and will be disposed of here in a single report. The title application was the subject of an examiner's report and recommended order served on December 2, 1958. Thereafter, the proceeding was reopened for further hearing on a consolidated record with the other 13 applications.

Exceptions to the order recommended by the examiner in the consolidated proceeding were filed by all of the applicants except Southwest Freight Lines, Inc., and by certain interveners and protestants; replies to exceptions were filed by 12 of the applicants jointly, and by interveners and protestants.[2] Subsequently, the proceedings were referred to the entire Commission for determination and made the subject of oral argument.

By application filed February 12, 1958, in the title proceeding, the Western Express Company, of Cleveland, Ohio, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities, including Class A and class B explosives and commodities in bulk, but excluding commodi-

[2] Interveners and protestants and the parties filing exceptions and replies are named in appendix A hereto.

ties in bulk in tank vehicles, commodities of unusual value, household goods as defined by the Commission, and commodities requiring special equipment, in connection with applicant's presently authorized operations. The 13 subtitled applications are described in detail in appendix B hereto. All applicants seek specific authority to transport liquid and dry flowable commodities in certain newly developed collapsible or "stackable" containers (at times hereinafter referred to, collectively, as C & S containers) over the routes and in the territories they now serve pursuant to their existing certificates. The applicants are major regular-route motor common carriers of general commodities, with the usual exceptions, including, typically, "commodities in bulk" and "commodities requiring special equipment." Some applicants also hold similar authority over irregular routes, or hold certificates with "general commodity" descriptions which (1) lack either or both of these two usual exceptions, or (2) have an exception differently phrased, such as "except liquids, in bulk, in tank trucks."

Applicants take the position that the transportation of commodities in C & S containers is neither bulk service nor service performed with special equipment; that consequently their certificates now authorize such transportation; and that the applications therefore should be dismissed. Alternatively, they contend that if this interpretation of their authorities is incorrect, they should be granted authority to transport the specific or general commodities sought in each of their applications. The examiner found that general-commodity carriers whose operating rights are restricted against transportation of "commodities in bulk" and "commodities requiring special equipment" do have authority to transport liquid and dry flowable commodities moving in C & S containers, except in sealed tanks with capacities of 1,000 gallons or more; and he recommended that the applications be denied.

Description of C. & S. Containers

The record in these proceedings contains detailed descriptions of Sealddrums, Sealdbins, and Sealdtanks, which are trade name products of the U.S. Rubber Company, and of Nest-A-Bins, which are trade name products of the Kaiser Industries Corporation. Other new C & S containers have been developed and marketed since the taking of evidence in these cases. These newer C & S containers have uses, characteristics, and advantages very similar to those of the "seald" containers and Nest-A-Bins, and their use by motor carriers also raises the same interpretation problems under consideration here. Many commodities, including edibles, may be transported safely and efficiently in all of these C & S containers. The C & S containers at issue in these proceedings are briefly described below.

1. A Sealddrum, which basically is made of four ply nylon tire cord, will collapse, after use, to one-fifth of its loaded size. The record shows that they are made in 55-gallon and 500-gallon sizes. Counsel on argument say they now also are made in 375-gallon and 1,000-gallon sies. The Sealddrum 55 has a 35-pound tare weight, and the sealddrum 500 has a 160-pound tare weight. About eight Sealddrum 500's can be loaded on the bed of an ordinary trailer, and they may also be double tiered. Sealddrum 55's loaded with water have been test dropped from heights of about 200 feet onto concrete, without damage to the container.

2. The Sealdbin, which also is made of nylon tire cord, will collapse, after use, to about one-ninth its loaded size. Three sizes are now available: the Sealdbin 70 (with a capacity of 70 cubic feet), the Sealdbin 300, and Sealdbin 370. The Sealdbin 370 is intended primarily for rail-car use. Sealdbins are designed for transportation of dry, flowable commodities. They are fitted with D-rings to facilitate crane-type lifting by hooks, are usually filled prior to placement on the carrier's vehicle, and can be handled efficiently by cranes or fork-life trucks. A Sealdbin 300 will

accommodate lading weighing from 9,000 to 18,000 pounds, and from three to four may be placed on a single ordinary trailer.

3. Sealdtanks, which are made of the same material as Sealddrums and Sealdbins, will collapse, after use, to about 3 percent of their loaded size. They range in capacity from 450 gallons to 4,400 gallons for use on ordinary trailer equipment, but most Sealdtanks in actual use range in capacity from 3,000 to 3,800 gallons. The larger Sealdtanks are useful for rail or barge transportation, or for storage. A 2,000-gallon Sealdtank costs about $1,500, and and 4,000-gallon tank about $2,000. The dimensions of Sealdtanks may vary somewhat; for example, three types have been manufactured with a capacity of 2,200 gallons: one, 20 feet long, 7 feet 3 inches wide, 47 inches high; the second, 23 feet long, 7 feet wide, 45 inches high; and the third, 21 feet long, 7 feet 4 inches wide, and 48 inches high. A 1,000-gallon Sealdtank has a 650-pound tare weight; and a 3,750-gallon Sealdtank has a 1,150-pound tare weight. While the Sealdbin may be handled easily by cranes, hooks, and forklifts, the Sealdtanks may not be so handled unless rigid support is added—such as a "strongback," a large skid device. The most efficient way to use the Sealdtanks so far developed is to fill them after they have been placed on a vehicle. One of the supporting shippers described such a loading as follows:

Well, the carrier brings his trailer into the plant, and it is loaded in the rear of the plant where our storage facilities are, and we lift the container to the rear of the trailer. It is unrolled by two or three men. Before it is unrolled we put the tiedown straps in the foot of the trailer of the floor, and then the container is unrolled, and then we hook up to it, pump it full, and then we tie down the tiedown straps perhaps and secure the load and that is it.

The entire operation takes less than 2 hours. Lifting the Sealdtank onto the trailer by forklift, and unrolling it into place for filling requires about 15 minutes. The tiedown straps used generally are similar to those used for securing

loads of steel articles or lumber. The carrier, in the specific type of operation described above, then picks up the trailer and spots it on the premises of the consignee. The consignee in turn pumps out the lading, rolls up the Sealdtank, and calls the carrier to pick up its trailer.

4. Nest-A-Bins, when empty, may be stacked like paper cups so that 10 bins take up the floor space occupied by 1 loaded nest-a-bin. The bins in question are aluminum, airtight, and corrosive resistant. They come in three standard sizes, 63 cubic feet, 70 cubic feet, and 77 cubic feet, and are designed to hold granular, powdered, paste, or liquid commodities. An ordinary 32-foot trailer holds 14 full bins, or about 170 "nested" bins. Uniform pallet-type bases are being developed to facilitate handling by forklift or handtrucks. These bins also can be easily handled by overhead cranes. The manufacturer is in the process of developing Nest-A-Bins in three new sizes for liquid commodities, with capacities of 220 gallons, 440 gallons, and 550 gallons.

EXCEPTIONS, REPLIES, AND ARGUMENTS

The positions taken by the parties on oral argument generally supported their views expressed in their prior pleadings. The intervening Regular Common Carrier Conference, the Common Carrier Conference—Irregular Route, and the National Tank Truck Carriers, Inc., hereinafter referred to as the Regular Route Conference, the Irregular Route Conference, and the NTTC, respectively, limit their arguments to the issues of certificate interpretation in these proceedings. On exceptions the applicants, the Regular Route Conference, the Irregular Route Conference, Eastern Express, Inc., and Associated Transport, Inc., collectively contend that neither the "commodities in bulk" exception nor the "commodities requiring special equipment" exception to applicants' general commodity authority prohibits the transportation of liquid or dry flowable commodities in the new collapsible or stackable containers. They argue that

the "commodities in bulk" exception relates to and prohibits only bulk transportation; that bulk transportation takes place only when fungible commodities are poured, pumped, or dumped directly into the transporting vehicle in such a manner that the commodities are confined by and adopt the shape of the interior of the vehicle, citing *John L. Goss Corp. Contract Carrier Application*, 250 I.C.C. 101; that the term "commodities in bulk" is a term of art, designating a specializde field of service in which the carrier employs specialized *vehicular* equipment which is not adaptable to transportation of general freight; and that general freight carriers, using ordinary vehicular equipment, have always transported the same dry and liquid commodities as have the tank truckers, for the same shippers, and between the same points; the only difference being that the commodities handled by the former move in packages, drums, or other containers. These exceptants take the position that it makes no difference whether the C & S container is filled before or after placement on the vehicle; and that the filling by a shipper of a Sealdtank mounted on an ordinary trailer does not convert the carrier's operations to "specialized service."

Exceptants further argue that the "commodities requiring special equipment" exception relates to and prohibits only transportation of those commodities which inherently require use of specialized equipment; and that, in actuality, the transportation of liquids in Sealdtanks requires the use of conventional flat-bed or van type vehicles, citing *Langdon Common Carrier Application*, 27 M.C.C. 391, for the proposition that transportation of liquids in containers is within the general freight carriers' field of service because the liquids to be moved in containers "are susceptible" to transportation on conventional vehicles. They aver that both experimentally and in actual operation loaded Sealdtanks, with individual capacities ranging up to about 2,000 gallons, have been transported satisfactorily

at the same time and on the same vehicle with substantial quantities of other freight.

Applicants and the supporting interveners emphasize that the above interpretation is completely consistent with the national transportation policy. They argue that to preclude the general freight carriers, under their existing authorities, from transporting the full line of C & S containers now becoming available, would dissipate the thrust of technological advances in the transportation industry; and that the tank truckers are not in a position to promote use of these new C & S containers, particularly because they do not ordinarily operate the type of trailer equipment suitable for handling such containers.

On the question of whether the general-commodity carriers should be permitted to furnish C & S containers to shippers or consignees, applicants take the position that ownership or control of containers has no bearing on the interpretation issue; that general-commodity carriers are not now restricted from providing containers, pallets, or other shipping devices to shippers; and that no new arbitrary limitation of this type should be imposed. On the alternative question of whether the public convenience and necessity has been shown to require the granting of their applications, applicants maintain that the examiner did not give any substantive consideration to the demonstrated shipper need for C & S container service. They contend that there is a definite public need for their proposed services; that the tank-truck carriers have not "stepped into the breach" to meet this widespread need; that the instant proposals, to a large extent, would merely help applicants regain dry flowable and liquid traffic which has been lost to tank truckers in recent years because of an increasing trend away from drum and towards bulk shipments; and that the examiner failed to consider a number of important facts essential for an accurate picture of the record.

Certain applicants also argue on exceptions that each of their 32 requested findings of fact and law, which are listed

on brief, be specifically adopted; or, if any is rejected, that a specific reason be given therefor in accordance with section 8(b) of the Administrative Procedure Act.

The NTTC on exceptions contends that according to the Commission's dangerous articles regulations,[3] a Sealdtank being used for transportation of fluids is a "cargo tank," and its use on a motor vehicle makes the vehicle a "tank vehicle"; that a commodity in bulk is any fluid commodity which is tendered to the carrier for transportation and carried to destination as an amorphous, unpackaged fluid mass, loaded or unloaded by means of a hose or pipe, and confined while in transit by a receptacle which is an integral part of the vehicle itself; that considering the type of service general-commodity carriers have provided in the past in transporting fluids in relatively small containers, there is no factual basis for the examiner's suggested 1,000-gallon "quantity test"; and that any rule to be applied in these cases should be equally applicable to all demountable containers, including those which are yet to be developed for similar transportation uses. Thirteen other protesting tank-truck carriers take essentially the same position, arguing on exceptions that the examiner's proposed 1,000-gallon quantity test is not supported by the record, or by custom or usage; and that transportation of liquid or dry commodities in C & S containers in quantities greater than 55 gallons per container is outside the scope of service

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[3] Explosives and Other Dangerous Articles, 41 CFR 71.8(f) reads: "(1) Any tank designed to be permanently attached to any motor vehicle or any container not permanently attached to any motor vehicle which by reason of its size, construction, or attachment to any motor vehicle must be loaded and/or unloaded without being removed from the vehicle and which tank or container is to be used to transport any flammable liquid, corrosive liquid or poisonous liquid, class B, is hereby designated 'cargo tank'." Subparagraph (e) of 41 CFR 71.8 reads: "Tank Motor Vehicle. The term 'tank motor vehicle' means any motor vehicle designed or used for the transportation of liquids or gases covered by Parts 71-78 of this chapter in any cargo tank."

normally authorized to be performed by general-commodity carriers. York Interstate Trucking also contends that general-commodity carriers lack authority to transport fluid commodities in bulk regardless of whether the descriptions used in their certificates are made subject to the "usual exceptions." Certain protestants point out that for nearly 20 years prior to 1957, and long prior to Sealdtank usage, general-commodity carriers offered to transport, according to the history of rule 5 of the National Motor Freight Classification, (*a*) liquid commodities in containers with capacities no greater than 165 gallons, or (*b*) dry commodities in containers with capacities no greater than 600 gallons. They aver, however, that they would accept the examiner's suggested 1,000-gallon test with respect to Sealdtanks, provided the Sealdtanks are filled prior to being placed on the trailer.

Western Express Company and 11 other applicants jointly reply that they here are proposing transportation employing only ordinary vehicular equipment, such as vans and flat beds, rather than specialized equipment or tank vehicles; that the mere tying down of a C & S container to an ordinary flat-bed trailer does not convert that vehicle into a tank vehicle; that the means, e.g., hose or pipe, by which a shipper fills a container, whether of 55-gallon or 500-gallon capacity, has no bearing on the type of carrier service to be rendered thereafter; that, in interpreting applicants' rights, where no special service is required of the carrier, it is immaterial whether the C & S container is filled by the shipper before or after placement on the vehicle; and that the dangerous articles regulations are not relevant in deciding the issues presented here. The Regular Route Conference takes a basically similar position in its reply.

The NTTC replies that any expansion of the applicants' services to embrace bulk transportation should be authorized only upon specific proof that the public convenience and necessity require such new operations; and that any

interpretation permitting applicants to transport commodities in C & S containers under their present general-commodity authority would permit them to invade a field of service heretofore exclusively occupied by transporters of liquid and dry commodities in tank vehicles.

Also, in reply to applicants' exceptions, E. Brooke Matlack and 13 other individual tank-truck protestants collectively assert that applicants have failed to prove any inadequacy in existing transportation facilities; that protestants in fact are able and willing to provide whatever bulk transportation service is required by the supporting shippers; and that the applicants essentially are seeking to provide a new and competitive service in the field of bulk transportation. Commercial Oil Transport and three other protestants jointly advance the argument that although the supporting shippers apparently expect the use of Sealdtanks to result in less expensive transportation, there is no substantive evidence that applicants would provide Sealdtank transportation at rate levels lower than those now in effect for service performed in conventional tank vehicles.

The eastern territory railroads are not agreed on their position with respect to the scope of applicants' authorities, and on oral argument aver that they do not take any position on that issue. Class I rail carriers in the western district, the Southern Railway Company system, and the Atlantic Coast Line Railroad Company, however, are in basic agreement with the position taken by NTTC and other protestants. They further argue that from the beginning of motor-carrier regulation liquids shipped in any container larger than 165-gallon drums have not been considered "package freight"; and that therefore a 165-gallon quantity test would have historical validity.

The Evidence

The evidence adduced, the examiner's recommendations, the exceptions, and the replies thereto have been considered.

We find the statements of facts in the examiner's report to be substantially correct. As amplified in certain respects in light of applicants' specific objections to the examiner's summary, that statement of facts is adopted as our own.

Applicants.—Each of the applicants engages in the transportation of liquid and dry flowable commodities in barrels, drums, bags, or other containers. Applicant, Jones Truck Lines, Inc., for example, during a 1-week period ended May 19, 1959, transported 201 individual shipments of liquid or dry flowable commodities, primarily in drums but also in bags, kegs, sacks, pails, and cans. It expressed the opinion that much of this traffic was susceptible to movement in C & S containers. Seven of the shipments mentioned were in drums, in quantities aggregating more than 20,000 pounds per shipment. Applicants assert that unless they are allowed to provide a flexible service transporting flowable commodities in C & S containers, they face the loss of substantial and needed traffic to other transporters, particularly in the field of private carriage. Several of the applicants have acquired actual experience in the transportation of flowables in C & S containers, as well as in transporting commodities in (1) large aluminum tote bins, (2) "wire cage" containers suitable for forklift loading or unloading, (3) sealed cans (containing airplane engines) weighing as much as 6,000 pounds, and (4) aggregated commodities on pallets. Generally, applicants feel that their provision of service employing all types of C & S containers for transportation of flowable commodities is, or should be, a part of their normal transportation operations. Some of the applicants propose to furnish carrier-owned C & S containers, just as they presently furnish pallets, racks, rails, or similar facilities for greater ease of loading, or for holding lading in place. In furnishing such containers, they assert that they would apply a rate based on the gross weight of the commodity plus container, and would make an additional charge for rental of the container. When shipper-provided C & S containers are

used, a surcharge would be assessed for the return of the empty containers.

Certain other general-commodity carriers not applying for authority in these proceedings but supporting the views of applicants on the questions of certificate interpretation, also described their operations and past uses of C & S containers. One in particular, Consolidated Freightways Corporation, has used several types of these containers with very successful results. Much of its operating authority contains no restriction against transportation of commodities in bulk or those requiring special equipment, and it maintains two completely separate operating divisions, a general-commodity division and a tank vehicle division. It has been using C & S containers in the general-commodity division with conventional equipment and the usual personnel of that division. Its experience has been that use of these containers has helped greatly to balance previously unbalanced traffic patterns. Recently it has been able to backhaul liquid sugar and grapejuice, for example, from rural areas in central and western Washington to its terminals along the Pacific coast on ordinary equipment which previously had to be deadheaded to these terminals. It is willing to interline, with other carriers, shipments moving in C & S containers, and considers such operations wholly feasible. At the time of the hearing it owned eleven 2,200-gallon Sealdtanks and had 10 more on order; it owned 1 Sealdbin and had 4 others on order; and it also owned several other types of collapsible containers. At that time, too, it was participating with manufacturing companies, including the Goodyear Tire and Rubber Company, in the development of other collapsible containers basically similar to Sealdtanks and Sealdbins, but having other new features and characteristics.

Shippers.—As a general proposition, the supporting shippers, all consignors and receivers of dry flowable and liquid commodities in substantial quantities, believe that general-commodity carriers either are now, or ought to be, author-

ized to handle their traffic in the new C & S containers. Collectively, in moving their fungible, flowable goods to and from numerous points, they make extensive use of drums, kegs, pails, and bags, as well as rail tank cars and motor tank vehicles. A number of them now making shipments in 55-gallon drums desire to convert to Sealdtanks. Several shippers supplement motor common carrier service by using their own vehicles on intercity line-haul movements. Shippers generally now are making little more than experimental use of C & S containers; several have purchased a few such containers, and others express a willingness to do so as this type of transportation develops. Many prospective advantages are foreseen. Some anticipate that the employment of such containers will help eliminate the necessity of using expensive stainless steel drums or expensive liners for ordinary drums together with the attendant costs for storing drums, reconditioning them, or returning them as high-bulk freight. Similar economies could be effected, they believe, if C & S containers were substituted for other types of disposable or returnable containers now in general use. Shippers are of the view that the general-commodity carriers are in a better position than tank-truck operators to promote efficient development of C & S container transportation. They feel that because the vehicles operated by applicants on outbound movement of commodities in C & S containers would be available for payload return movement of many other types of freight, applicants could provide transportation of flowables in C & S containers with lower average costs than tank-truck carriers; and that these lower costs ultimately should be reflected in lower rates.

One shipper, the Durez Plastics Division of the Hooker Chemical Corporation, made an investigation of its probable transportation costs in using C & S containers. It makes extensive use of for-hire transportation of flowable commodities, in drums, bags, and tank vehicles, and also uses six tank trailers and seven vans in private carriage of

its products. It concluded from its investigation that it would secure no cost advantages at any time in using C & S containers for traffic moving to destinations within 200 miles of its plant. On the other hand, it concluded that for shipments to points 400 miles or more distant, use of C & S containers on the lines of the general-commodity carriers would provide its lowest cost motor transportation. After taking account of such costs as material handling at its plant, container costs, and the published motor-carrier rates it felt would be applicable, it concluded that its total transportation costs per pound for movement of a filled 3,000- to 3,500-gallon Sealdtank from its North Tonawanda, N. Y., plant to Chicago, Ill., would be:

	Cents
C & S container	1.48
Private tank truck	1.74
For-hire tank truck	2.05
For-hire movement in drums	2.93

A résumé of the testimony adduced by the shippers is set forth in appendix C hereto.

Protestants.—Until the beginning of World War II the motor carriers of commodities in bulk primarily engaged in the transportation of liquid petroleum products in tank vehicles, or of such commodities as sand, gravel, and coal in dump vehicles. Since that time there has been a substantial expansion in bulk carriage by motor vehicle, particularly in the service of the chemical and food industry. Vehicles have been developed with compartments to transport varying quantities of liquids, from 100 gallons upwards. Generally, the operating authority held by these carriers is limited to the transportation of specific as distinguished from general commodities between specific points or territories. Their collective operating rights encompass 48 States. In the typical case, the tank trucker has gradually extended its operations and its holding out of service to meet specifically asserted new needs of shippers in its

territory. Some of the traffic these carriers now enjoy previously was shipped in drums and was diverted from the general-commodity carriers; but a large portion has been generated by the enormous growth of shippers' productive and marketing capacities, together with great technological advances within the tank truck industry itself.

The operating rights, equipment, and plant investments, and actual operations of the protestant motor carriers are described in detail in the examiner's report and will not be repeated here. They have substantial investments in terminal facilities and equipment. Although they comprise a dynamic, growing industry and transport a substantial volume of liquid and dry flowable traffic, they are not using their vehicles at capacity, and they fear a serious diversion of traffic to general-commodity carriers if applicants are successful in their contentions. Few of them now make much use of C & S containers in their operations, allegedly because they have not had requests for such service from shippers. A high percentage of their operations consists of backhauls of empty equipment.

For the purpose of illustrating the basis of protestants' opposition to applicants' proposals, the testimony adduced by two of the larger tank truckers will be briefly restated. P. B. Mutrie Motor Transportation, Inc., of Waltham, Mass., holds extensive authority to transport both general and specified commodities. It has operated as a motor tank carrier of liquids since 1925, and now handles much dry and liquid freight, in bulk, using hopper type and tank vehicles. It is authorized to transport various bulk commodities between points and areas in 23 States, its principal operations being conducted in the New England and Middle Atlantic States. Its tank vehicles are loaded on 65 percent of the miles operated. It has an approximately 50 percent load factor on its transportation of liquid petroleum, that is, the equipment utilized therefor is ordinarily deadheaded on return movements. It owns and operates 221 tank vehicles reflecting an investment of approximately

$1.6 million, including many vehicles constructed of stainless steel, aluminum, carbon steel, or iron. Many of its trailers are lined with rubber, heresite, or other protective materials. Many have three compartments, and one has seven compartments with separate discharge lines for each compartment, the smallest having a capacity of 250 gallons. Mutrie has provided service for 12 of the 16 supporting shippers, and regularly solicits their bulk traffic. When two of the supporting shippers inquired of Mutrie about Sealdtank transportation, it placed three Sealdtanks in service. Thereafter it was tendered traffic by only one of these shippers, a movement of aluminum sulphate in Sealdtanks placed in vans from Everett, Mass., to destinations in Maine, New Hampshire, and Massachusetts. It has had no experience with Sealdbin-type containers. Mutrie also pioneered in the development of bulk movements of liquid chocolate for one of the supporting shippers, investing about $20,000 in acquiring a special tank trailer to move that commodity. However, the traffic was subsequently lost to general commodity carriers using Sealdtanks.

Chemical Tank Lines, Inc., Leaman Transportation Corporation, and Leaman Transportation Company, Inc., are tank truckers under common ownership and management. Collectively, they are authorized to transport numerous liquid commodities between points and areas in 35 States located generally east of the Mississippi River. Their tariffs contain minimum load requirements which are susceptible to change at the request of a shipper, and they hold themselves out to transport any quantity tendered. They collectively operate about 800 tank trailers, of which more than 200 are compartmented, including 2 with 7 compartments. Many of these vehicles are specially constructed or specially lined to meet specific needs of individual shippers. Protestants operate flat-bed equipment, but not temperature-controlled vans. They aver that although they have not handled any traffic in collapsible containers and have not been solicited to do so, they would be willing to meet

requests for that type of transportation. They regularly provide service for nine of the supporting shippers. Their line-haul movements average between 150 and 200 miles, with, normally an empty backhaul. They take the position that the transportation of a filled 220-gallon Nest-A-Bin on a flat bed is essentially a bulk movement and is not barred by the qualifying phrase "in bulk, in tank vehicles," which appears in much of their operating authority.

PERTINENT COMMODITY DESCRIPTIONS

Applicants.—The most typical of the general-commodity descriptions appearing in the applicants' certificates reads as follows: "General commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment." Most of the applicants hold some general-commodity authority which lacks one or both of the two exceptions with which we are here concerned. Other variations in the exceptions include:

(a) "Except liquid commodities, in bulk, in tank vehicles." *(b)* "Except liquid commodities in bulk." *(c)* "Except liquids, in bulk, in tank trucks." *(d)* "Except commodities in bulk requiring special equipment." *(e)* "Except commodities of a bulk or size requiring special equipment." *(f)* "Except articles in bulk, and articles exceeding the size and capacity of equipment." *(g)* "Except petroleum products in bulk."

Motor protestants.—By far the most typical commodity description contained in protestants' certificates is of specific commodities, or types of commodities, followed by the qualifying phrase "in bulk, in tank vehicles," or "in bulk, in tank trucks." Some of the descriptions simply specify a commodity, e.g., "liquid petroleum products," without further qualifications. Other variations include:

(a) [Named commodity] "in bulk, in tank equipment." *(b)* "Silicate of soda, in bulk." *(c)* "Lime, limestone, limestone products, in bulk, in tank vehicles, or in bags." *(d)* "Such commodities as are usually transported in dump

trucks." *(e)* "Dry sulphur, in bulk, in dump trucks." *(f)* "Dry chemicals, in bulk, in tank or hopper-type vehicles." *(g)* "Aluminum sulphate, in bulk, in hopper vehicles." *(h)* [Named commodity] "in bulk, in dump-tank or hopper-type vehicles."

Discussion

The primary question to be determined in these proceedings is whether, or to what extent, the so-called usual exceptions specified in grants of authority to transport general commodities preclude transportation of fungible, flowable commodities, dry or liquid, in the described collapsible and stackable containers. The reason why general-commodity carriers have historically been excluded from transporting the classes of commodities described by these exceptions is well summarized in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, at page 268:

> The motor common carriers of general commodities were not in the early stages of their development, and generally are not now equipped to handle dangerous explosives, money, securities, or other articles of very high value, household goods, sand, coal, and other commodities which usually move loose in bulk, or any commodity which requires the use of equipment not ordinarily used in the movement of packed or dry freight. Prior to the enactment of the Motor Carrier Act, previously referred to, the motor common carrier, insofar as interstate commerce was concerned, had no legal duty to transport all the traffic tendered to it, and consequently its holding out fell into well-defined channels. It transported such commodities only as would readily load onto its equipment without damage to other lading or to equipment and which would not exceed the carrying capacity of its vehicle. With the passage of the Motor Carrier Act, motor common carriers were permitted to continue such operations as they conducted on the critical date and continuously thereafter. The exceptions then as now reflect the general-commodity carriers' self-imposed limitations.

Until the development of the C & S containers there was, in fact, relatively little doubt about what operations and

services are within the general commodity carriers' field of service, as contrasted with that of the tank truckers or transporters of dry bulk commodities. Primarily, the types of over-the-road equipment employed by the carrier performing liquid or dry bulk service have been, on the whole, markedly different from those utilized by the general-commodity carrier. Indeed, it is well settled that the transportation of liquid commodities, in bulk, in tank vehicles, is a specialized service which carriers of general freight do not normally hold themselves out to perform, and that the term "special equipment" includes tank vehicles. *Meddock Extension of Operations—Refrigerator Service*, 30 M.C.C. 301, and *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. And in *Transport Motor Exp., Inc., Ext.—Lacquers and Paints*, 53 M.C.C. 267, division 5 held that the "commodities requiring special equipment" exception to the authority of a general-commodity carrier proscribes the transportation of loaded, shipper-owned tank trailers, stating that when a commodity requires the use of special equipment its transportation is prohibited by the exception regardless of the ownership of the tank equipment in which the commodities move.

Also, on a number of occasions the Commission has considered the interpretation of the "in bulk" limitation. In *Mulqueen Contract Carrier Application*, 250 I.C.C. 436, division 4 held that pig iron and steel billets are not "bulk" commodities within the meaning of section 303(b) of the Interstate Commerce Act, saying, at page 439:

The term "commodities in bulk" is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece. Typical of such bulk commodities are coal, ore, sand, gravel, and grains. Pig iron is a processed or semimanufactured product and is of such size and weight that it cannot be poured, scooped, or shoveled. Pigs are often 1½ to 2 feet in length and weigh upwards of 100 pounds. They can be handled piece by piece. The foregoing statements apply with equal force

to steel billets. We therefore conclude that pig iron and steel billets are not bulk commodities and their transportation is not exempt under section 303(b), even though they may be transported without wrappers or containers and without transportation mark or count.

In a similar case dealing with the section 303(b) exemption, *John L. Goss Corp. Contract Carrier Application, supra*, it was held that an applicant's transportation of granite, stowed without transportation mark or count in a schooner or in barges, was not transportation of a commodity in bulk. Division 4 there said, at page 103:

The term "in bulk" commonly refers to a loose mass which is poured or thrown into a vessel or a vehicle without regard to order, and which is restrained during transportation only by the bottoms and sides of the carrying vessel and its bulkheads.

Thereafter, in *Brower Extension—Waste Materials*, 67 M.C.C. 343, it was found that, in accordance with the reasoning in the *Mulqueen* case, waste or scrap materials, including scrap metal, are not "bulk" commodities because such materials vary in size, shape, and weight, lack the homogeneity of state generally associated with bulk commodities, and can be handled piece by piece. For similar reasons, lumber was held not to be a bulk commodity within the meaning of the "in bulk" exception to the authority held by general-commodity carriers in *Ryland Contract Carrier Application*, 69 M.C.C. 86.

Obviously, however, the uses of C & S containers tend to blur the heretofore relatively clear distinction between the field of service of the general freight carrier and that of the carrier of bulk commodities whether liquid or dry, and whether transported in tank, dump, or hopper type vehicles. Most motor carriers of general commodities, with the usual exceptions, limit their transportation of liquid commodities to those in containers, the largest being 55-gallon and 165-gallon drums. Conversely, tank truckers ordinarily transport flowable commodities only in large

rigid tanks permanently mounted on trailer chassis. Thus, where ordinary over-the-road vehicles are to be used with C & S containers having capacities exceeding those of conventional drums or hogsheads, the transportation itself will partake of distinctive qualities of both packaged and bulk service.

On the specific question as to whether C & S container transportation belongs within one or the other basic field of service, we think it clear that by its nature such transportation falls exclusively within neither field and should not arbitrarily be so confined. In the past when general freight carriers have transported fungible, flowable commodities, those commodities have been contained or packaged by the shipper—in bags, drums, hogsheads, and the like—prior to tender[6] of the shipment to the carrier. This is the type of transportation service discussed in the *Langdon* case, *supra*, referred to by applicants. On the other hand, shippers of fungible, flowable commodities have been able to offer their traffic to tank truckers without the necessity of having to package it beforehand; it has been necessary for such a shipper merely to pump or pour the commodity directly into the vehicle in which it will be transported. See *Whitfield Transp., Inc.*, v. *Solis*, 83 M.C.C. 25. This distinction between packaged and bulk service is basic and is clearly discernible in present and prospective uses of C & S containers. No justification has been shown for applying a different rule or for establishing, arbitrarily, a new one for differentiating between the two types of service in connection with the movement of flowable commodities in C & S containers on ordinary equipment.

When a shipper fills a Sealdtank, Sealdbin, Sealddrum, Nest-A-Bin, or other similar C & S container and then

[6] The term "tender" has many shades of legal meanings. Our concern here is with the type of motor service being provided rather than with determining when legal responsibility for the security of property shifts from the owner of the lading to the transporter or vice versa.

tenders it to a carrier utilizing ordinary trailer equipment (provided special loading equipment, such as cranes, winches, et cetera, is not used by the carrier), the transportation service involved is not outside the scope of the general commodity carrier's authority, as usually phrased. Stated differently, we do not believe that general-commodity carriers with exceptions in their authority directed against both the transportation of "commodities in bulk" and "those requiring special equipment" should be precluded from transporting flowable, fungible commodities when tendered in unmounted C & S containers. In this connection, we do not believe that a quantity test such as that recommended by the examiner with respect to Sealdtanks, or urged by protestants, should be followed. Protestants cite the definitions and capacities of containers given in rule 5 of the National Motor Freight Classification as the basis for such a test, but it is well established that interpretations of commodity descriptions in operating rights are not controlled by classifications for rate purposes. Compare *Freightway Corporation Extension—Metal Forgings*, 51 M.C.C. 227, and No. MC-C-2474, *O'Neill Transfer Co., Inc., Investigation of Operations*, 83 M.C.C. 753. Applicants are in a position, through technological innovations and improvements, to accept containers having substantially larger individual carrying capacities than have heretofore been in general use. Inasmuch as the record herein clearly shows that the handling of unmounted, filled C & S containers does not require any of the special services or equipment normally identified with the movement of bulk commodities, we see no valid reason for holding that commodities in such containers may not be transported by general-commodity carriers, or for limiting the volume which may be handled in an individual C & S container to a stipulated maximum gallonage or weight. Furthermore, we are not convinced that we should preclude the general commodity carriers from furnishing C & S containers for the use of shippers and consignees, provided (1) they are furnished without discrimination and

(2) reasonable charges are collected therefor. Compare *Iron or Steel, in Containers—Central Territory*, 54 M.C.C. 139. Conceivably a workable scheme of interchanging such containers among carriers, consignors, and consignees will be devised. We decline at this point to block these prospective uses of C & S containers. The specific provisions of such proposals will, of course, be subject to closer scrutiny in proceedings directly concerned with appropriate tariff filings.

However, when a shipper of fungible, flowable commodities tenders them loose and uncontained, that is, pours them into a C & S container which has been previously placed or mounted in or upon the carrier's vehicle, the transportation service involved must, we think, be considered beyond the scope of general-commodity authorizations restricted against the movement of commodities in bulk or those requiring the use of special equipment, for two reasons. First, by being able to tend its fungible, flowable commodities, minus packaging of any type beforehand, the shipper is being provided an essential element of bulk transportation which has not been available from general freight carriers in the past. Secondly, when a C & S container is placed or mounted upon a vehicle so that a fungible, flowable commodity may be poured, pumped, dumped, et cetera, into such container, the aggregate of facilities provided constitutes a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle; and, like such vehicles, the unit in question clearly falls within the category of "special equipment." There are interesting similarities, too, between a unit on which C & S containers are mounted and the "multiple unit car" considered for some purposes to be the equivalent of a tank car in *Definition of Tank Cars*, 104 I.C.C. 196. Compare, too, *P. B. Mutrie Motor Transp., Inc., Ext.—Benzyl Chloride*, 83 M.C.C. 123, in which so-called "tube trailers" designed for transporting multiple cylinders of compressed gas were found to be tank equipment. In this

connection, the definition of "cargo tank" and "tank motor vehicle" given in our dangerous explosives regulations are primarily for safety purposes with a view to prescribing the manner and equipment in which flammable, corrosive, and poisonous bulk liquids are to be transported, and would not without adoption control the construction or interpretation of outstanding certificates and permits. Compare *Navajo Freight Lines, Inc., Extension—Liquefied Gases*, 84 M.C.C. 221. We are of the further opinion that general commodity carriers are barred by the indicated exceptions from transporting loose, flowable, and fungible commodities when tendered into a premounted C & S container whether the transportation equipment, including the vehicle and container, is supplied by the shipper or by the carrier.

In light of the foregoing, we conclude that motor carriers authorized to transport specified fungible, flowable commodities "in bulk" or "in bulk, in tank vehicles" or "in bulk, in tank trucks" are entitled to transport such commodities when they are pumped, poured, dumped, et cetera, into C & S container premounted on or in conventional trailers, regardless of ownership or control of the containers.

All of the foregoing conclusions relative to the manner in which the involved carriers can or cannot receive the considered commodities, are equally applicable to the manner in which delivery can or cannot be made at destination. It is apparent that a carrier is not authorized to deliver the commodity at destination except by the same means that it is authorized to receive the commodity at the origin.

It is clear that authority to transport "general commodities," without commodity limitations or exceptions, would permit the movement of commodities in any and all types of C & S containers regardless of the method of handling. See *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc., supra.* However, a brief comment is needed concerning the effect of variations in the language

of the restrictive exceptions specified in certain of the general-commodity authority held by applicants. For example, restrictions phrased "except liquid commodities in bulk, in *tank vehicles*" or "except liquid in bulk, *in tank trucks*" must be considered as prohibiting the transportation of liquid commodities when tendered into premounted C & S containers. By the same token, restrictions phrased "except liquid commodities in bulk," "except articles in bulk," or "except petroleum products in bulk" are to be interpreted as precluding transportation in C & S containers in those instances where the carrier would provide a distinctive bulk transportation service as hereinbefore described in this report; furthermore, restrictions phrased "except commodities in bulk requiring special equipment," or "except commodities of a bulk or size requiring special equipment" are to be interpreted as precluding transportation of the specified commodities in C & S containers in those instances where the transportation facilities to be employed would include use of a trailer with a premounted container.

As seen, applicants maintain that they should be granted specific authority to provide any service found herein to be beyond the scope of their present operating authorities. In view of that position we have examined closely the supporting evidence in these proceedings. Although this evidence has been most informative concerning the practices of major industrial shippers using C & S containers and in helping us to evaluate their plans for using C & S containers in the future, in our opinion it does not warrant a grant of new operating authority to any of the applicants herein. The fact is that our findings in these proceedings should encourage applicants to provide, by flexible use of the new C & S containers, extensive and valuable new services for these and other shippers under their present certificates. On the other hand, there has been no showing of dissatisfaction with the services of the protesting motor carriers, or of their present or prospective

inability or unwillingness to provide bulk service in C & S containers when required by shippers. We conclude that no new specific operating authority should be granted. To the extent that the present C & S container operations of any of the applicants are not within the scope of their certificates, under the principles outlined above, those operations should, of course, be discontinued unless or until appropriate operating authority therefor is obtained.

The only other matter requiring discussion is the request of certain applicants for specific rulings on their 32 requested findings of fact or law pursuant to section 8 of the Administrative Procedure Act. We have considered in this report all of the substantive arguments put forward by the applicants, and we believe that a detailed finding of fact or law specifically related to each requested finding would serve no useful purpose. It is well established that the Administrative Procedure Act does not require detailed findings of every subsidiary evidentiary fact, or a specific ruling on each proposed finding of fact. So long as the agency makes clear the factual basis on which it has proceeded, and the conclusions arrived at have a rational basis in those facts, the necessary requirements are satisfied. *Coyle Lines, Inc.*, v. *United States*, 115 F. Supp. 272, and *Ringsby Truck Lines, Inc.—Purchase—Motorways, Inc.*, 65 M.C.C. 395, 410.

Summarizing, we conclude (1) that general-commodity carriers with restrictions against the transportation of commodities in bulk or those requiring special equipment *are* authorized to transport loose, flowable, and fungible commodities when tendered in dismounted C & S containers, whether supplied by the carrier or shipper, (2) that general-commodity carriers, as described in (1) above, *are not* authorized to transport such commodities when tendered into a premounted C & S container; and (3) that tank-truck carriers *are* authorized to transport such commodities when tendered into a premounted C & S container, whether supplied by the carrier or shipper.

Findings

We find that the authorities held by applicants as motor common carriers to transport general commodities, except commodities in bulk or those requiring special equipment, includes the right to transport flowable, fungible commodities when tendered in collapsible and stackable containers, in the circumstances and under the conditions herein above set forth; and that to this extent the applications should be dismissed.

We further find that applicants have failed to establish that the present and future public convenience and necessity require any of their proposed operations which exceed the scope of their presently held operating rights; and that to this extent the applications should be denied.

An appropriate order will be entered.

Commissioner Webb, whom Commissioner Walrath joins, dissenting in part:

In my opinion, carriers of general commodities, with the usual exceptions, are authorized to transport loose, flowable, and fungible commodities in C & S containers regardless of whether such containers are filled on or off the trailer. In the interest of brevity and clarity, this expression will be confined to the transportation of commodities in "Sealdtanks" as distinguished from the smaller C & S containers which, in my opinion, involve the transportation of commodities in packages rather than in bulk.

The majority concludes that the transportation of commodities in bulk is involved if the "Sealdtank" is filled while on the carrier's trailer. I agree. The majority then concludes that a carrier of general commodities whose certificate contains a restriction against the transportation of "commodities in bulk" may not transport loose, flowable, and fungible commodities when tendered into a premounted "Sealdtank." I do not agree with this further conclusion.

The result in this proceeding should be determined by the guideposts of the national transportation policy. That policy is not a mere technical or hortatory preamble. Where, as here, broad principles having a profound impact on numerous carriers and shippers are formulated and applied for the first time, failure to discuss, or even to mention, the declared national transportation policy constitutes a fatal infirmity in the report of the Commission. *Eastern-Central Motor Carriers Assn.* v. *United States,* 321 U.S. 194 (1944).

Obviously, the majority's interpretation of the typical certificate of carriers of general commodities is not patently unsound. If a certificate contains a restriction against the transportation of "commodities in bulk" and if the movement of premounted "Sealdtanks" involves the transportation of "commodities in bulk," the majority's conclusion appears almost inexorable. However, in dealing with subjects as fluid and as dynamic as transportation and administrative law, we should be mindful of Judge Learned Hand's aphorism that "there is no surer way to misread any document than to read it literally," *Guiseppi* v. *Walling,* 144 F. (2d) 608, 623-624 (C.C.A. 2d, 1944).

However reasonable the literal construction of the majority it is certainly no less reasonable to interpret the restrictive clauses of the certificates in question in the light of the historical purpose they were designed to serve. Historically, common carriers have been permitted to impose certain limitations on the services they hold out to the public. The permissible area of withheld service was recognized at common law. It was recognized at the time motor common carriers were brought under Federal regulation. In general, it was felt that common carriers should not be required to provide transportation involving unusual services (household goods); assume unusual liability (gold and currency); assume unusual hazards (explosives); or provide special equipment (commodities in bulk and commodities of unusual size or weight).

Following passage of the Motor Carrier Act of 1935, these self-imposed limitations were incorporated in the grandfather certificates and certificates issued thereafter to carriers of general commodities. *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 268.

The report finds that a "Sealdtank" is not special equipment. It is clear, however, that the typical exception respecting "commodities in bulk" became the handmaiden of the general-commodity grant only because transportation of commodities in bulk required the carrier to provide specialized vehicular equipment. Here, the transportation in question is accomplished by the use of ordinary trailers. The Commission has held that a carrier of general commodities (except household goods) may lawfully handle commodities within the province of a household-goods carrier if no special service is provided and if no special vehicular equipment is employed for over-the-road transportation. *American Red Ball Transit Co.* v. *McLean Trucking*, 67 M.C.C. 305.

What this case really involves is a choice between two methods of certificate construction, the one literal and the other pragmatic. Neither approach is unreasonable. It is unreasonable, in my opinion, to make the choice without reference to the provisions of the declared national transportation policy. The Commission's duty to promote improved shipping methods was expressed as follows in *Iron or Steel in Containers—Central Territory*, 54 M.C.C. 139 (1952), at page 153:

It is abundantly clear on this record that in many instances the use of containers for the shipments in question represents a long step forward in the promotion of safe, adequate, economical, and efficient service. In the light of our duty under the national transportation policy, we have no thought but to encourage such an improvement in shipping methods, which brings substantial benefits to the respondents as well as to the shippers and the general public.

There is not the slightest doubt about the result which would best promote "adequate, economical, and efficient service" within the meaning of the national transportation policy. As pointed out in the report, "the most efficient way to use the Sealdtanks so far developed is to fill them after they have been placed on a vehicle." Also, the record is clear that tank truck carriers are not likely to promote actively the use of "Sealdtanks" because, in most instances, they do not own or operate, and are unlikely to purchase, the trailer equipment suitable for handling such "containers." The anomalous result reached by the majority is that general commodities carriers, who are mostly likely to promote the use of "Sealdtanks," are precluded from handling them in an efficient manner, while the tank truck carriers, who are not likely to encourage the new technological development, are not so restricted.

To the extent that expertise in transportation and expertise in transportation law can be separated, the former is the more important of the two. This proceeding cannot be viewed solely as a problem in certificate interpretation, unaffected by illumination from the national transportation policy, without producing results which are ludicrous from a practical transportation point of view.

The large rubber bags known as "Sealdtanks" can be filled faster if they are left on the trailer. The loading operation can be performed at less expense if the Commission does not require that the empty bags be taken off the trailer, placed on a pallet, a strongback or other supporting device, filled, and then as a unit lifted back on to the trailer by a forklift or crane. Large shippers may be able to avoid this inefficient operation by resorting to private carriage. Many small shippers have no such alternative. Carriers of general commodities may be able to afford the expense of prosecuting the applications required to provide shippers with a complete "Sealdtank" service. The Commission can ill-afford the time required to process

the large number of applications for extensions of authority made necessary by the findings in the report.

No doubt some of the traffic presently handled by tank truck carriers would be diverted if the views expressed above should ultimately prevail. The extent of such diversion would not be so great, in my opinion, as to materially and adversely affect the service now being rendered by this group of specialized carriers. Progress customarily bears a price tag. The Commission has no duty to shield any mode of transportation or any segment of any mode from the impact of science and technology. On the contrary, as the Commission pointed out in *Capital Bus Co. Extension —Washington, D.C.*, 69 M.C.C. 447 (1957) at page 452:

In this connection, it should be noted that we do not conceive our function in proceedings such as this to preserve the *status quo* at all costs, denying improvements or augmentations in existing service. The transportation industry should be dynamic, rather than static; and we would be remiss in our duty, if we hampered, rather than promoted, the easy flow of traffic.

APPENDIX A

1. Protestants and interveners in opposition include: The Atchison, Topeka and Santa Fe Railway Company, and 49 other class I railroads throughout the country, including carriers of the Texas Railroad Association, eastern territory railroads, and class I rail carriers in the western district, the National Tank Truck Carriers, Inc., Greenleaf Motor Express, Inc., Coastal Tank Lines, Inc., Hugh Breeding, Inc., Fort Edwards Express Co., Inc., Earl Bray, Inc., Ryder Tank Lines, Inc., Hearin Tank Lines, Inc., Robertson Tank Lines, Inc., T. I. McCormack Trucking Company, Inc., Forbes Trucking Company, Inc., Refiners Transport & Terminal Corporation, Walker Hauling Company, Inc., H. R. Ritter Trucking Company, Inc., Earl Clarence Gibbon, W. M. Chambers Truck Line, Inc., Refiners Transport, Inc., Durward Bell, Shipley Transfer, Inc., M. I. O'Boyle & Sons, Inc., James F. Black, Emery Transportation Company, Ecoff Trucking Company, Wright Motor Lines, Inc., Denver-Chicago Transport Company, Inc., Provan Petro-

leum Transportation Co., Inc., Krajack Tank Lines, Inc., Rollo Trucking Corporation, James J. Ketaing, Inc., Brockway Fast Motor Freight, C & E Trucking Corporation, Palmer Transfer, Inc., P. B. Mutrie Motor Transportation, Inc., E. Brooke Matlack, Inc., P. E. Kramme, Inc., Schirmer Transportation Co., Transport, Inc., Milk Transport, Inc., Commercial Oil Transport, Sprout & Davis, Inc., Chemical Tank Lines, Inc., Leaman Transportation Corporation, Leaman Transportation Company, Inc., Liquid Tranporters, Inc., Highway Transport, Inc., Petroleum Carrier Corporation, C & H Transportation Company, Inc., F. J. Egner & Sons, Inc., Craun Transportation, Inc., Harold W. Stewart, Inc., Highway Transportation Co., The Billy Baker Company, Rogers Cartage Company, Producers Transport, Inc., Bulk Transport, Inc., Quality Carriers, Inc., Denver-Chicago Trucking Company, Inc., Ford Brothers, Inc., Erickson Transport Corporation, McKenzie Tank Lines, Inc., H. F. Johnson, Inc., William F. Crossett, Inc., Ruan Transport Corporation, and York Interstate Trucking Co., Inc., The O.K. Trucking Company intervened as its interests appear.

2. Interveners in support of the applications include:

Regular Common Carrier Conference, National Industrial Traffic League, Common Carrier Conference—Irregular Route, U.S. Rubber Company, Associated Transport, Inc., Eastern Express, Inc., and Jasper & Chicago Motor Express, Inc.

3. In addition to applicants, the following parties filed exceptions:

(*a*) *Supporting interveners*

Common carrier conference—Irregular Route, Associated Transport, Inc., Eastern Express, Inc., Regular Common Carrier Conference,

(*b*) *Protestants and opposing interveners*

National Tank Truck Carriers, Inc., York Interstate Trucking, Inc., Ford Brothers, Inc., McKenzie Tank Lines, Inc., Greenleaf Motor Express, Inc., E. Brooke Matlack, Inc., P. E. Kramme, Inc., Ryder Tank Lines, Inc., Refiners Transport & Terminal Corporation, T. I. McCormack

Trucking Company, Inc., Forbes Trucking Co., Inc., Chemical Tank Lines, Inc., Leaman Transportation Company, Inc., and Leaman Transportation Corporation.

4. Replies were filed:

(*a*) To the exceptions of protestants and opposing interveners by: Applicants (except Southwest Freight Lines, Inc.) and Regular Common Carrier Conference.

(*b*) To the exceptions of applicants and supporting interveners by: E. Brooke Matlack, Inc., P. E. Kramme, Inc., Refiners Transport & Terminal Corporation, Commercial Oil Transport, Hearin Tank Lines, Inc., P. B. Mutrie Motor Transportation, Inc., Robertson Tank Lines, Inc., Chemical Tank Lines, Inc., Leaman Transportation Company, Inc., Leaman Transportation Corporation, Liquid Transporters, Inc., Highway Transport, Inc., Petroleum Carrier Corporation, and National Tank Truck Carriers, Inc.

APPENDIX B

The applications and pertinent authorities of the applicants

The applicant in the title proceeding is authorized to transport general commodities, with the usual exceptions, over regular routes, extending, generally, between Toledo, Ohio, on the west, and Boston, Mass., on the east, serving numerous intermediate points, including Cleveland, Ohio, Erie, Pa., and Buffalo, Syracuse, and Albany, N.Y. Its lines connect with those of other applicants, and it is willing to interline C & S container traffic with other motor carriers.

In No. MC—112713 (Sub-No. 82), by application filed March 26, 1959, Yellow Transit Freight Lines, Inc., of Kansas City, Mo., seeks a certificate authorizing operations, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular and irregular routes, transporting liquid or dry commodities in collapsible tanks or bins or the equivalent thereof, between all points applicant is authorized to serve in the transportation of general commodities pursuant to certificate No. MC—112713 and subnumbers thereunder. Yellow Transit presently holds extensive authority to transport general commodities, with in

most instances one or the other of the two usual exceptions relating to commodities in bulk and those requiring special equipment. It holds some irregular-route authority, but its principal operations extend over a network of regular routes between points in the Midwest and Texas.

In No. MC—29120 (Sub-No. 56), by application filed April 8, 1959, Wilson Storage and Transfer Co., of Sioux Falls, S. Dak., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular and regular routes, transporting liquid or dry commodities, in collapsible tanks or bins marketed by the U.S. Rubber Company under the trade name "Sealdtanks" or "Sealdbins," or the equivalent thereof, between all points applicant is presently authorized to serve in the transportation of general commodities as authorized in certificates in No. MC—29120 and subnumbers thereunder. Wilson operates principally over regular routes extending between Minneapolis, Minn., and Chicago, on the one hand, and, on the other, points in North Dakota and South Dakota. Much of its general-commodity authority is limited by one or the other of the two pertinent usual exceptions.

In No. MC—59852 (Sub-No. 11), by application filed April 28, 1959, All States Freight, Incorporated, of Akron, Ohio, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular and irregular routes, transporting liquid and dry commodities, in containers, including, but not limited to, Sealdtank and Sealdbin containers in or upon ordinary vehicles, over the routes and in the territory, including all off-routes and intermediate points, authorized to be served by applicant in certificate No. MC—59852 and subnumbers thereunder, authorizing transportation of general commodities. All States is primarily a common carrier of general commodities over regular routes extending from Boston, Mass., and Baltimore, Md., to Chicago, serving such major metropolitan centers as New York City, Buffalo, Pittsburgh, Pa., Cleveland, and Fort Wayne, Ind. Generally its authority is restricted by the usual exceptions imposed in general-commodity rights. Its lines connect with those of many other carriers.

In No. MC—2202 (Sub-No. 172), by application filed April 28, 1959, Roadway Express, Inc., of Akron, seeks a cerificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular and irregular routes, tansporting liquid commodities and dry commodities, in containers, including, but not limited to, Sealdtanks and Sealdbins when transported in standard vehicles, over the routes and in the territory, including all off-route and intermediate points, authorized to be served by applicant in certificate No. MC—2202 and various subnumbers thereto, covering transportation of general commodities.

In No. MC—69274 (Sub-No. 4), by application filed April 30, 1959, M & R Transportation Co., Inc., of Akron, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier, by motor vehicle, over regular and irregular routes, transporting liquid commodites and dry commodities, in containers, including, but not limited to, Sealdtanks and Sealdbins transported in standard motor vehicles, over the routes and in the territory, including all off-route and intermediate points authorized to be served by applicant in certificate No. MC—69274 and various subnumbers thereto, covering the transportation of general commodities, with certan exceptions.

Roadway Express controls and operates M & R Transportation Co. Their present combined regular routes extend generally between points in Texas and southeastern points, on the one hand, and, on the other, points in midwestern States and eastern and New England points. Much of their general-commodity authority is limited by one or the other of the pertinent usual exceptions.

In No. MC—74721 (Sub-No. 69), by application filed April 28, 1959, Motor Cargo, Inc., of Akron, Ohio, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular and irregular routes, transporting liquid commodities and dry commodities, in containers, including, but not limited to, Sealdtanks and Sealdbins, in standard motor vehicles, over the routes and in the territory, including all off-route and intermediate points, authorized to be served by applicant in certificate

No. MC—74721 and subnumbers thereto, covering the transportation of general commodities, with certain exceptions. Motor Cargo operates primarily as a carrier of general commodities, for the most part restricted by the usual exceptions considered herein, over regular routes extending from Minneapolis and Des Moines, Iowa, on the west, to New York, N.Y., on the east, serving numerous intermediate points, including Chicago, Cleveland, and Philadelphia, Pa.

In Nos. MC—111231 (Sub-No. 38), by application filed April 30, 1959, Jones Truck Lines, Inc., of Springdale, Ark., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier, by motor vehicle, over regular and irregular routes transporting liquid and dry commodities, in containers, including but not limited to Sealdtank and Sealdbin containers, in or upon ordinary vehicles, over the routes and in the territory, including all off-route and intermediate points, authorized to be served by aplicant in certificate No. MC—111231 and subnumbers thereto, covering the transportation of general commodities, with certain exceptions. Jones operates primarily as a common carrier of general commodities, except commodities in bulk and those requiring special equipment, over regular routes extending between St. Louis and Kansas City, Mo., on the north, and Memphis, Tenn., and Fort Worth, Tex., on the south.

In No. MC—2229 (Sub-No. 97), by application filed May 12, 1959, Red Ball Motor Freight, Inc., of Dallas, Tex., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier, by motor vehicle, over regular routes, transporting liquid or dry commodities, in collapsible tanks or bins, or the equivalent thereof, between all points authorized to be served in transportation of general commodities specified in certificate No. MC—2229 and various subnumbers thereto.

In No. MC—105265 (Sub-No. 42), now renumbered No. MC—2229 (Sub-No. 103), Red Ball Motor Freight, Inc., of Dallas, Tex., by application filed May 12, 1959, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common

carrier by motor vehicle, over regular routes, transporting liquid or dry commondities in collapsible tanks or bins, or the equivalent thereof, between all points it is presently authorized to serve in the transportation of general commodities as described in certificate No. MC—105265 and subnumbers thereunder.

By order entered May 23, 1960, Red Ball Motor Freight, Inc., was substituted as applicant in lieu of Denver-Amarillo Red Ball Motor Freight, Inc., subsequent to a merger of their operations approved by the Commission. Its principal operations under these certificates consist of the transportation of general commodities, with exceptions, over regular routes extending between numerous points in Texas and Denver, Colo.

In No. MC—64650 (Sub-No. 16), by application filed May 13, 1959, W. T. Cowan, Incorporated, of Baltimore, Md., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over regular routes, or liquid and dry commodities in containers, including, but not limited to, Sealdtank and Sealdbin containers in or upon ordinary vehicles, between the points and in the territory authorized to be served in certificate No. MC—64650 covering the transportation of general commodities, with certain exceptions. Cowan is principally a carrier of general commodities over regular routes extending between points in the District of Columbia and Virginia, on the one hand, and, on the other, points in the New York area, serving Baltimore, Md., Philadelphia, and Trenton and Newark, N.J., among other points.

In No. MC—29566 (Sub-No. 59), by application filed May 18, 1959, Southwest Freight Lines, Inc., of Kansas City, Mo., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier, by motor vehicle, over regular and irregular routes, of commodities, liquid or dry, in collapsible containers, including, but not limited to, Sealdtanks and Sealdbins, transported in or on standard motor vehicles from, to, and between the points authorized in applicant's certificates in No. MC—29566 and subnumbers thereunder, covering transportation of general commodities, with certain exceptions. Applicant is au-

thorized to transport general commodities, with the usual exceptions, between points over described routes in Missouri, and, basically, between those Missouri regular-route points, on the one hand, and, on the other, points in Illinois, Iowa, Kansas, Oklahoma, and Arkansas, in truckload lots.

In No. MC—46280 (Sub-No. 40), by application filed May 26, 1959, Darling Freight, Inc., of Grand Rapids, Mich., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier, by motor vehicle, over regular and irregular routes, transporting liquid and dry commodities in containers, including, but not limited to, Sealdtank and Sealdbins when transported in standard vehicles, over the routes and in the territory, including all off-route and intermediate points, authorized to be served by applicant in certificate No. MC—46280 and subnumbers thereunder, covering the transportation of general commodities. Darling holds extensive authority to transport general commodities, with the usual exceptions, (*a*) over a number of regular routes principally within Michigan, and (*b*) over irregular routes between numerous specified points and areas in Michigan, Indiana, Illinois, Iowa, Minnesota, and Wisconsin.

In No. MC—22229 (Sub-No. 27), by application filed May 18, 1959, Terminal Transport Company, Inc., of Atlanta, Ga., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over regular and irregular routes, of liquid or dry commodities in containers including, but not limited to, Sealdtanks and Sealdbins when transported in standard vehicles, over the routes and in the territory authorized to be served by applicant in certificate No. MC—22229 and subnumbers thereunder covering the transportation of general commodities. Applicant is primarily a carrier of general commodities pursuant to authority limited for the most part by one or the other of the usual exceptions, over regular routes extending generally from Tampa and Jacksonville, Fla., to Chicago, serving intermediate points.

APPENDIX C

The Supporting Shippers

Shawinigan Resins Corporation, of Indian Orchard, Mass., manufactures polyvinyl acetate resins. It is particularly interested in use of the new C & S containers for transportation of one of its products, a polyvinyl acetate emulsion, of which it produces about 12,000,000 pounds a year. It ships about two truckloads a day of its products in heresite-lined drums from plants at Springfield, Mass., and Flint, Mich., to warehouses at Atlanta, Ga., Jersey City, N.J., Chicago, Ill., Los Angeles and Oakland, Calif., Seattle, Wash., and Portland, Oreg., and to customers at numerous other points throughout the United States. Between 1953 and 1958, its utilization of tank-truck and tank-car transportation on outbound traffic increased from 8 to 51 percent. Its shipments range in weight from 10,000 pounds to 70,000 pounds. There has been an increase in the demand from customers for deliveries of from 500- to 1,000-gallon quantities. It asserts that it is now not feasible for it to ship these smaller lots by tank truck because of either (1) rate minimums or (2) "sloshing" when the tank trucks are not filled to capacity, which causes harmful "skinning." It feels that the problem of skinning will not arise when using airtight C & S containers such as Sealdtanks. It knows of no carrier that will provide it with stainless steel insulated tank-trucks with 500-gallon or 1,000-gallon compartments. It believes that it will increase its sales substantially if it can obtain some flexible type of C & S container service.

The Archer-Daniels-Midland Company, of Minneapolis, Minn., operates approximately 156 industrial plants, including mines, elevators, and dehydrating plants, and 65 warehouses at points throughout the United States. Its activities include the processing of agricultural commodities such as grain, soybeans, flaxseed, alfalfa, flax straw, as well as fish and sea animal oils, and the production of various chemicals, including synthetic resins. It produces linseed oil at Minneapolis, soybean oil at Decatur, Ill., fish and sea animal oils at Rahway, N.J., chemicals at Wyandotte, Mich., synthetic resins at Newark, Pensacola, Fla., Minneapolis, Valley Park, Mo., and Los Angeles, and foundry core compound at Cleveland. Shipments are made

in drums or by tank truck or rail tank car to points throughout the United States. It operates 12 tank trucks in private carriage, including four compartmented to handle 1,000-gallon shipments. It plans to lease Nest-A-Bin containers to transport liquid commodities now moving in 55-gallon drums, and believes that these containers would be particularly suitable for shipments to smaller customers without bulk storage. It also believes that there is, or will be, a similar need for transportation of flour, soybean meal, linseed meal, and alfalfa meal in granular form in the new C & S containers, but it has not yet developed that traffic to any extent.

The B. F. Goodrich Company operates about 40 plants and 40 warehouses throughout the country. Its major productive facilities are at Watertown, Mass., Shelton, Conn., Tuscaloosa, Ala., Akron, Miami, Okla., Los Angeles, and Portland, Oreg. It expresses an interest in using either Sealdtank-type or Sealdbin-type containers for liquid latex imported from Manila and Singapore. It would have these containers filled at those origins, moved by ship to Pacific, Gulf, and/or Atlantic ports, and then, from shipside, moved by motor carrier to its various plants. It has not determined what size containers will best suit those operations, but it feels that use of such containers would be more economic and would result in more expeditious delivery than its present method of shipment. It also has a substantial movement of carbon black in bags and in bulk from the Southwest to its various production plants. It proposes to use C & S containers of its own manufacture for this traffic and also for a new synthetic carbon black substitute. However, it has no plans to ship any traffic now moving by rail or tank truck in these containers.

Colgate-Palmolive, a manufacturer of soap and soap products, toilet articles, and glycerine in both dry and liquid form, supports all of the applications. It ships a substantial volume of traffic, both raw and finished goods, to and from its plants at Jersey City, N.J., Jeffersonville, Ind., Kansas City, Kans., Berkeley, Calif., Buffalo. It has a high volume of interplant movements of raw materials, receives raw materials from numerous points throughout the country, and ships finished products to numerous points. The Jersey City plant receives phosphates and

certain ultrawet chemicals from Baltimore and Philadelphia, and silica from Charleston, W. Va. Its interplant movements include, for example, shipments of "essential oils," such as peppermint oil, in drums, in 20,000 to 30,000 pound lots. These drums, which are made of stainless steel, cost between $75 and $100 each. The shipper expects to be able to use the new C & S containers for such traffic. Generally, it expects to divert to Sealdtanks and Sealdbins only that traffic which is now moving in drums, estimated at from 10 to 20 percent of its present tonnage.

The Allied Chemical Corporation, a major producer of industrial and argicultural chemicals, ships liquid and dry flowable commodities from 134 primary plants and 43 warehouses to points throughout the United States. Annually it ships about 3 million tons inbound, and 8 million tons outbound by rail; and about 3 million tons outbound and 1 million tons inbound by motor vehicle. About 30 percent of the truck shipments move in tank vehicles. An additional 1,300,000 tons of freight moves in 552 private operated tank trucks. Shipper employs various nonreturnable containers for much of its traffic, and makes extensive use of the services of several of the applicants. Use of the new C & S containers would permit a substantial reduction in the number of containers which it must now purchase, maintain, and store. It feels that the general-commodity carriers are in an excellent position to provide economic and flexible service using these C & S containers, and asserts that it would prefer to use common-carrier service in lieu of private carriage for this C & S container traffic. Generally, it has received satisfactory service from for-hire tank truckers and does not plan to divert traffic from them by use of the C & S containers. It would use the new containers principally for products now moving in conventional containers and those now moving to it warehousing points by private tank trucks or in rail tank cars.

The Cowles Chemical Company, of Cleveland, produces industrial chemicals at Skaneateles Falls and Lockport, N.Y., and Sewaren, N.J. Its inbound traffic includes liquid and dry flowable caustic soda, silicate of soda, and liquid phosphoric acid. Inbound liquid shipments move in tank trucks. It ships about 24 million pounds of silicate of soda, in dry flowable form, annually in bags and drums to points throughout the United States. The bags are multi-wall

paper bags which cost about 15 cents apiece, and the drums are made of fiberboard costing about $2.40 a piece. It plans to use the new C & S containers, and looks forward to a general improvement in service arising from such use. It also is giving definite consideration to the use of Sealdbins on inbound movements to its plants of granular sodium phosphate from Kearny, N.J. Existing tank truck service is described as satisfactory.

The U.S. Rubber Company maintains about 40 manufacturing plants around the country from which it ships a number of dry and liquid commodities susceptible to handling in the new collapsible and stackable containers. In particular, it indicated the following movements as representative of the traffic for which the new containers would be useful: carbon black from points in Louisiana, Texas, Oklahoma, and Kansas to Port Neches, Tex.; "master batch" from Port Neches to numerous points in the United States; various dry and liquid commodities from North Bergen, N.J., to points in New England, the Midwest, and the South; plastic powder from Painesville, Ohio, to points in the East and Midwest; liquid synthetic latex from Naugatuck, Conn., to points in New England, points in Midwestern States and Southern States; and synthetic latex from Gastonia, N.C., to carpet manufacturers in Southern States. It presently ships plastic powder in Sealdbins from Painesville to Mishawaka, Ind., Newbergh, N.Y., and Bushwick, N.Y.; carbon black in Sealdbins from several Louisiana points to Eau Claire, Wis., and Port Neches; and liquid plastic and latex from South Bound Brook and North Bergen, N.J., to Providence, R.I., in Sealdtanks.

The Dow Chemical Company, a major manufacturer of chemicals, plastics, and magnesium products, has approved approximately a dozen of its numerous liquid products for handling in the new C & S containers. In addition, many of its dry commodities, such as plastic granules, calcium chloride, and caustic soda, may be handled efficiently in the Sealdbin-type containers. As pertinent here, its plants at Seal Beach, Torrance, and Pittsburg, Calif., Allens Point, Conn., Plaquemine, La., Bay City, Ludington, and Midland, Mich., and Freeport, Tex., are producing commodities which are deemed suitable for C & S container transportation. These plants make shipments directly to consumers

or to warehouse and bulk storage facilities located throughout the United States. In addition to extensive use of for-hire tank-car and tank-trucks service, Dow ships a substantial quantity of freight in paper bags, drums and cartons, using general-commodity carriers in LTL and truckload service. It has been using Sealdtanks on traffic moving from Pittsburg, Calif. This traffic, which had previously moved in tank trucks, is now shipped in Sealdtanks ranging in capacity from 3,000 to 4,000 gallons. It uses Sealdbins for a movement of granules from Freeport to Cleveland, and Macedon, N.Y., in 10,000-pound quantities in rail gondola cars. A movement of plastic granules from Shreveport to Homer, La., in 10,000-pound Sealdbins, was handled by one of the applicants herein. It also has used Sealdbins for intraplant movements of plastics at Midland. Some of its customers require deliveries of LTL quantities of several products in a single shipment. Compartmented vehicles are useful for some of this traffic, but the new C & S containers are even better adapted to this type of hauling. Dow notes a continuing trend away from use of drums for the movement of its commodities. For example, prior to 1946 all of its latex was shipped in 55-gallon metal drums, but by the end of 1958 75 percent of its outbound latex was being shipped in bulk. This also is the situation with regard to dry flowable commodities such as plastic granules. Prior to 1951 such commodities moved either in multiple-wall paper bags or fiber drums, but since that time 35 percent of these commodities have been moving in 1,000-pound fiberboard containers. It expects to acquire and use Sealdtanks, Sealdbins, and Sealddrums, but believes that in some cases shipments will be made in customer-owned C & S containers.

A sugar refining company, with a small refinery at Aiea in the Hawaiian Islands and a larger refinery at Crockett, Calif., distributes granular and liquid sugar on the Pacific coast. It has a conversion plant at Portland, where it liquefies granular sugar. During the last 10 years sugar has been moving in increasing volume in liquid form to users who previously received their sugar in 100-pound sacks. Shipments are made by rail and motor carrier in approximately equal proportions. The new C & S containers are useful in transporting its products. It has used Consolidated Freightways for movements of liquid

sugar, in Sealdtanks, from Crockett to customers in Portland and Seattle. On these shipments the carrier furnished the Sealdtank which was loaded and unloaded while mounted on the tank truck. The refinery also has used the Nest-A-Bin containers which were filled with sugar after they had been placed on the carrier's vehicle. It has used other types of containers for its shipments including tote bins each having a capacity of approximately 3,000 pounds. None of the applicants in these proceedings holds authority to serve this shipper's plants directly.

Monsanto Chemical Company manufactures chemicals, chemical products, plastics, and petroleum products at 26 plants located throughout the country. Each plant regularly ships to points within a market area of about 500 miles. The transportation requirements of its St. Louis plant are said to be typical of the others. That plant during 1958 shipped between 20 million and 50 million pounds a month of its products by motor carrier, of which about 35 percent moved in bulk, in tank or hopper-type vehicles. A number of these products are now shipped in stainless steel or nickel drums or in glass carboys, all normally returning empty to origin. Monsanto anticipates that much of its drum and carboy traffic eventually will be converted to C & S container shippments. It asserts that the compartmented tank vehicles offered by the tank truckers are not economical for less-than-truckload shipments weighing from 5,000 pounds to 15,000 pounds, because of applicable rate minimums. It has purchased two Sealdtanks and has been using them in intraplant movements at Monsanto, Ill., and for storage purposes there. Liquid alum has been shipped from its Everett, Mass., plant to points in New England in 30,000-pound quantities, in Sealdtanks, using the service of one of the protestants, Mutrie, which provided the Sealdtanks. A Lamar, Mo., customer now receives phosphoric acid in 3,000-gallon quantities, in Sealdtanks, from the Monsanto, Ill, plant. This traffic is privately transported by the customer and provides a backhaul for movements of grain to the St. Louis and Chicago markets.

C. K. Williams and Company ships about 70,000 tons of dry pigments annually throughout the country to 6,500 customers principally in the paint industry. Half of this traffic moves by rail, and half by motor vehicle, mostly over

the lines of general-commodity carriers. These products usually are shipped in 50- or 75-pound multi-wall paper bags, which cost 10 cents each and are nonreturnable. About 10 percent of its motor freight moves to customers in truckload quantities, with the rest moving in less-than-truckload lots weighing from 500 pounds to 2,000 pounds. Its customers are requesting deliveries in larger containers, and its engineering department has recommended greater use of C & S containers with a view toward gradual conversion to shipping entirely by "bulk containers." It considers the Sealdbin to be superior to other types of "bulk containers" presently available, and is willing to make substantial investment in Sealdbins for use in its shipping operations.

Ludlow Papers, Inc., receives between 8 and 10 million pounds a year of plastic granules at its Homer, La., plant from Freeport and Orange, Tex. Seventy-five percent of this traffic moves in consignor-owned Sealdbins, both by rail and by motor carrier. Three Sealdbin 300's, containing 10,000 pounds each, are handled at a time on a single trailer in service provided by Red Ball, one of the applicants herein, and even such containers can be accommodated on a single rail gondola car. Use of the Sealdbin has reduced both handling costs at its plant and the price per pound charged by the consignor. Previously, the traffic had been shipped either in 50-pound multi-wall paper bags costing 15 cents apiece, or in 1,000-pound fiberboard boxes costing about $2.50 apiece.

The General Foods Corporation ships a substantial quantity of chocolate from a plant at Dorchester, Mass., to customers throughout the country. About 40 percent, or 10 million pounds annually, of this chocolate moves in liquid form in tank cars or tank trucks, and the remainder in solid form. The bulk liquid movements have developed only in the recent years; previously the chocolate moved solely in solid form. The company owns four 3,000-gallon Sealdtanks in which it has shipped liquid chocolate from Dorchester to Newark and Philadelphia, in heavy-duty trailers equipped with temperature control devices. On these movements, which were handled by the M & M Transportation Company, a general-commodity carrier, the shipper-owned Sealdtanks loaded and unloaded directly from the trailer. The shipper has tank-truck service

available for this traffic to Philadelphia from two tank truckers, including Mutrie, one of the protestants. It anticipates that Sealdtank deliveries will be made to many other points from Dorchester, and asserts that general-commodity carriers should be authorized, if they now lack authority, to provide the necessary transportation. Two of the applicants herein (All States Freight, Inc., and Roadway Express, Inc.), presently are transporting solid chocolate for shipper to authorized points.

The Durez Plastics Division of the Hooker Chemical Corporation ships about 100 million pounds a year of liquid and dry flowable plastic compounds from plants at North Tonawanda, N.Y., and Canton, Ohio, and from warehousing facilities located at various points throughout the country. The Canton plant ships only dry granular products, but the North Tonawanda plant ships about 40 percent of its production in liquid form, principally in drums. Durez ships its dry freight in Sealdtanks, Sealdbins, barrels, bags, and other containers and feels that the general-commodity carriers should be allowed to provide a complete service handling such containers.

The Union Carbide Corporation ships liquid and dry flowable commodities from and to some 250 shipping points throughout the country, using 3,000 Sealdbins for transportation of resins and plastics. About 90 percent of its Sealdbin traffic moves by rail, and the rest by general-commodity carriers. In such operations, the Sealdbins are filled before loading and then lifted upon a rail gondola car by a crane, and upon motor vehicles by forklift truck. It also has been shipping liquid resins in a leased 3,200-gallon Sealdtank from South Bound Brook, N.J. to Providence. The manner in which the Sealdtank is loaded and unloaded is described as follows:

"Associated Transport is called and they spot a reefer trailer at our liquid resin loading dock. Our men place the Sealdtank on the reefer trailer and roll it out and hook it up and then pump the material into the Sealdtank. When the Sealdtank is filled and the holddown bands are in place, we call Associated Transport to come and pick up the trailer and deliver it to Providence, R.I.

"At Providence, I believe U. S. Rubber has already testified, that the only operation up there is that U. S. Rubber

pumps off the material. U. S. Rubber's men roll the Sealdtank up and call Associated to pick the trailer up."

The shipper feels that these operations have been successful and that other liquid traffic can also be handled in this way. It believes that, for some commodities, Sealdtank transportation would be more economical than tank-truck transportation only in long hauls exceeding about 500 miles.

The J. S. Young Company ships about 10,000 tons a year of tanning extracts from plants at Baltimore, Md., and Peabody, Mass., to points in New England, the Midwest, and south by rail tank car and by motor vehicle, the extracts are subject to contamination by contact with iron, and consequently must be shipped in tank cars with specially installed asphalt linings which cost $570 a car. The company also uses wooden barrels weighing 100 pounds and costing $3.25 apiece, and reconditioned steel drums weighing 50 pounds and costing $4.00 apiece, for its containerized shipments. They are not returned for reuse. The shipper expects to derive many economies from using Sealdtank-type containers for its traffic, as such containers will need no protective linings, will reduce the tare weight of its shipments substantially, and can be transported readily over the connecting lines of the general-commodity carriers which now serve its plants.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-82 (SUB-No. 5)[1]

BEST WAY OF INDIANA, INC., EXTENSION—COLLAPSIBLE AND STACKABLE CONTAINERS

Decided April 28, 1961

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1. Certain proposed operations of applicants found to be permissible under presently held authorities.
2. Public convenience and necessity found not shown to require the other operations proposed by the applicants in each of the considered applications.
3. Applications dismissed in part and denied in part.

Ferdinand Born, James W. Wrape, Howell Ellis, David Axelrod, Edward G. Bazelon, Jack B. Josselson, G. M. Rebman, B. W. LaTourette, Jr., Reagan Sayers, Carll V. Kretsinger, Hugh T. Matthews, Charles M. Shepherd, Hamilton R. Winton, Frank W. Taylor, Jr., M. Ward Bailey, Marion R. Smyser, Thomas I. Wattles, Kenneth L. Laird, James K. Knudson, James E. Wilson, Robert C. Smith, Robert M. Curley, Harry V. McChesney, Jr., James E. Lesh, Clifford E. Sanders, Guy H. Postell, S. Harrison Kahn, Robert H. Griswold, James L. Blattey, Walter Harwood, R. V. Rathford, A. David Millner, James R. Stiverson, John Graham, Walter E. Shaeffer, James F. Miller, William B. Elmer, J. C. Schvner, Taylor C. Burneson, Everett Wheelock, John D. Polacek, James J. Doherty, John C. Doherty, John C.

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[1] This report also embraces 210 other applications, identified in attached appendix C. Each proceeding is entitled "Extension—Collapsible and Stackable Containers," but is identified in the appendix by its short title.

Bradley, Blaine Buchanan, James W. Lawson, R. W. Collingsworth, Thomas W. Murratt, Robert I. Perina, A. R. Fowler, Patrick T. Sheedy, John P. McMahon, John D. Herbert, Rex Eames, Louis I. Dailey, David C. Venable, Lee Reeder, Wentworth E. Griffin, John S. Fessenden, and *Walter F. Jones, Jr.,* for applicants.

Glenn W. Stephens, Ewell H. Muse, K. C. Elliot, Dale C. Dillon, Richard J. Hardy, Nuel D. Belnap, Marshall D. Becker, Mark K. Boyle, Arthur P. Boynton, Rolland Draves, Henry L. Fabritz, R. F. Hobbs, Douglas Stutsman, V. Baker Smith, Leonard A. Jaskiewicz, Harry C. Ames, Jr., Donald E. Langdon, James W. Lawson, Edwin C. Reminger, Charles W. Singer, John H. Lewis, Sol H. Proctor, B. A. Zubik, Chester A. Zyblut, Frank M. Covey, Jr., Donald L. Stern, Wilmer B. Hill, William Corroum, Charles T. Dodrill, Paul F. Barnes, and *Frank B. Hand, Jr.,* for motor-carrier protestants.

Charles W. Chapman, J. Edgar McDonald, Ed White, James W. Nisbet, B. C. Brile, Preston C. Shannon, and *Jack Rand* for rail-carrier protestants.

Richard J. Hardy, Nuel D. Belnap, C. Austin Sutherland, and *Frank M. Covey, Jr.,* for other protestants.

John C. Bradley, Albert B. Rosenbaum, R. Edwin Brady, Roland Rice, John S. Fessenden, James E. Wilson, and *David C. Venable* for interveners in support of applicants.

Alfred S. Knowlton for interveners as their interest may appear.

REPORT OF THE COMMISSION

BY THE COMMISSION:

These 211 applications seek similar operating authority, were heard on a consolidated record, and will be disposed of here in a single report. Exceptions to the order recommended by the examiner were filed by 114 of the applicants

and by certain interveners and protestants in some or all of these proceedings, and a number of the parties replied.

In the title application, by application filed June 22, 1959, Best Way of Indiana, Inc., of Terre Haute, Ind., seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle over irregular and regular routes, transporting liquid and dry commodities in containers, including but not limited to Sealdtank, Sealdbin, and Nest-A-Bin containers, in or upon ordinary vehicles, over the routes and in the territories, including all termini and off-route and other intermediate points applicant is authorized to serve in the transportation of general commodities, with certain stated exceptions, in its certificate No. MC-82. In substance, all of the other applications involve the same requests for specific authority to transport flowable, fungible commodities in certain newly developed collapsible and stackable containers, hereinafter referred to as C & S containers, over the routes and in the territories they now serve pursuant to their certificates. Numerous motor carriers, The National Tank Truck Carriers, Inc., The New York Central Railroad Company, and class I rail carriers in western territory individually oppose one or more or all of the applications. Rail carriers in official and southern territories intervened as their interests may appear, and the Regular Common Carrier Conference and the Common Carrier Conference Irregular Route of the American Trucking Associations, Inc., intervened in support of the applicants.

Applicants here, like those in the applications considered recently in No. MC-8902 (Sub-No. 12), *Western Exp. Co. Extension—Sealdtanks,* 84 M.C.C. 585, hereinafter called the *Western Express* case, are motor common carriers of general commodities, with the usual exceptions, including, typically, "commodities in bulk" and "commodities requiring special equipment." Some applicants hold certificates which lack one or both of these usual exceptions. Here, as in the *Western Express* case, it is the position of the appli-

cants generally (1) that they now possess the requisite authority to provide the proposed operations under their presently held certificates, and (2) that if this construction of their present authorities is not sustained by the Commission, then specific authority should be granted to allow the performance of such operations without restriction. It would unduly encumber this report to state even in the most summary fashion the substance of each application as filed. As noted in the examiner's report, these applications have been published in the Federal Register and the parties are well acquainted with their terms. They will, therefore, only be discussed generally as more detailed discussion is not required in disposing of the issues presented.

The report in the *Western Express* case contains detailed descriptions of Sealddrums, Sealdbins, Sealdtanks, and Nest-A-Bins. The record in the instant proceeding also contains descriptions of certain other C & S containers which have been developed and marketed in more recent months. These containers have uses, characteristics, and advantages very similar to those of the "Seald" containers and Nest-A-Bins, and their use by motor carriers raises the same problems of interpretation and construction as those involved in the *Western Express* case. A comparative listing of representative sizes and uses of presently available C & S containers is given in appendix A hereto.

Most general commodity carriers, and many shippers, have not yet really begun to use the new C & S containers in their operations, principally because of doubt as to whether, or to what extent, the typical general commodity carrier lawfully may transport flowable, fungible commodities in these containers. In the *Western Express* case this basic question was examined at length, and certain fundamental interpretive findings were made. In summary, it was there held:

(1) That general commodity carriers with restrictions against the transportation of commodities in bulk or those requiring special equipment are authorized to transport

loose, flowable, and fungible commodities when tendered in dismounted C & S containers (that is, not placed or mounted on or in a vehicle), whether supplied by the carrier or shipper;

(2) That general commodity carriers, as described in (1) above, are not authorized to transport such commodities when tendered into a premounted C & S container;

(3) That so-called tank truck carriers, protestants therein, as here, are authorized to transport such commodities when tendered into a premounted C & S container, whether supplied by the carrier or shipper; and

(4) That the foregoing conclusions relative to the manner in which general commodity carriers and tank truckers can or cannot receive the commodities in C & S containers are equally applicable to the manner in which delivery can or cannot be made at destination; that is, the carrier is not authorized to deliver the commodity at destination except by the same means that it is authorized to receive the commodity at origin.

THE ISSUES PRESENTED

The exceptions and replies filed by a number of applicants, protestants, and interveners are concerned solely with the question of certificate interpretation.[2] Other pleadings discussed below also devote a substantial amount of attention to that question. In these pleadings the parties take basic positions and advance arguments which are substantially the same as those considered by the entire Com-

[2] In this category are the following: (1) Exceptions filed by Eastern Express, Inc., jointly with 3 other applicants; Colonial Motor Freight Line, Inc., jointly with 8 other applicants and the Common Carrier Conference—Irregular Route; Anderson Motor Service, Inc., jointly with 12 other applicants; Regular Common Carrier Conference; Ford Brothers, Inc., The National Tank Truck Carriers, Inc., Ryder Tank Lines, Inc., and class I rail carriers in the western district. Also, by letter, Advance Express Co. indicates that it adopts as its own the exceptions of Eastern Express, Inc., and others, and (2) replies to exceptions by the Regular Common Carrier Conference and by the National Tank Truck Carriers, Inc.

mission in the *Western Express* case. In fact, most of the motor and rail protestants, and the carrier associations (including those supporting as well as those opposing the applicants) which are parties to this proceeding also were parties of record in the *Western Express* proceeding. Therefore, although we have examined and considered the arguments of all of parties which bear upon this issue, we believe that no useful purpose would be served by stating or discussing in this report those arguments relating to the interpreation issues presented. It will be enough to say that the conclusions reached in the *Western Express* case on these particular issues are controlling here.

In the instant proceeding therefore, the primary issue now before us is whether any of the applicants, now lacking such authority, should be granted specific authority to transport flowable, fungible commodities when such commodities are tendered into C & S containers premounted on or in a transporting vehicle. In deciding this question, of course, we are governed by section 207(a) of part II of the Interstate Commerce Act which provides that a certificate shall be issued to any qualified applicant therefor, if it is found, among other things, that the proposed service is or will be required by the public convenience and necessity. With respect to this question, the examiner specifically recommended that, to the extent the applicants seek any authority to transport commodities in C & S containers, which they do not now hold, the applications should be denied. Although he recommended a denial of all the applications, he did make a specific finding that a number of designated applicants, those having support for their applications from two or more shippers, had established a need for their services transporting commodities in C & S containers, but only to the extent already permissible under their existing certificates, as interpreted in his report. The examiner's interpretation of the scope of applicants' general commodity authority is essentially the same as that made in the *Western Express* case.

Most of the excepting applicants raise no specific objection to the statement of facts in the examiner's report. They contend, however, that general need has been shown by the supporting shippers for the proposed "complete" C & S container transportation service; that their respective requests for specific authority to provide that proposed "complete" service should be granted; and that, particularly to enable flexible joint-line transportation of commodities in C & S containers, all of the applications should be granted.[3] They argue that they are not seeking to institute a new service in this respect, but rather to continue existing service in a more economical and efficient manner; that their applications to "fill out" their general commodity authorities so as to be able to transport flowables in C & S containers under any and all conditions of tender are analagous to those of rail carriers or rail affiliates for authority to provide motor service auxiliary to, and supplemental of, rail service, as in *Kansas City S. Transport Co., Inc., Com. Car. Application*, 28 M.C.C. 5; and that the Commission should refrain, therefore, from imposing upon them an unrealistically heavy burden of technical proof in determining whether public convenience and necessity require the provision of complete C & S container service.

In addition, applicant Associated Transport, Inc., in company with 18 other applicants, takes the position that a failure to allow applicants to provide a realistically complete service transporting flowables in C & S containers will, in fact, serve only to promote private carriage at the expense of for-hire carriers; that the protestant tank truck-

[3] The following exceptants fall within this category: Hamburger Motor Express, Inc., jointly with 5 other applicants; Lyons Transportation Company, jointly with 3 other applicants; Long Transportation Company, jointly with 4 other applicants; Gordons Transports, Inc., jointly with 5 other applicants; McLean Trucking Company, jointly with 7 other applicants; Blake Motor Line, Inc., jointly with 4 other applicants; American Transit Lines, Inc., jointly with 18 other applicants; and Capitol Truck Lines, Inc., jointly with 10 other applicants.

ers are not now equipped, or otherwise in a position, efficiently to provide such service for the supporting shippers; that applicants do not here seek to provide a "new" service, but rather simply seek approval of their use of "new types of containers;" that the applicants' proof of need for the specific authority sought satisfies completely the classic test of public convenience and necessity stated in *Pan-American Bus Lines Operation,* 1 M.C.C. 190; that there is no reason to fear that granting the applications would cause any harmful diversion of traffic from any protestant; and that, in any event, the disadvantages to the protestants would be far outweighed by the benefits accruing to the public through establishment of the proposed services. Applicant Transamerican Freight Lines, Inc., also contends that it has established that the public convenience and necessity require issuance of the unrestricted authority it seeks herein; and that the examiner, in indicating in appendix A to his report that a total of 18 shippers (rather than an asserted total of 25 shippers) support the Transamerican application, demonstrates that he failed to consider all of the evidence adduced in support of its application.

Applicant Pennsylvania Truck Lines, Inc., jointly with two other applicant motor-carrier affiliates of the Pennsylvania Railroad Company, avers that the supporting shippers require their proposed services, not only where the C & S containers are to be filled prior to placement on a vehicle, but also where flowable, fungible commodities are to be tendered into premounted C & S containers on a vehicle; that the shipper evidence should be considered as bearing upon all of the applications; that the examiner erroneously failed to regard as "supporting evidence" testimony adduced by the Pennsylvania Railroad Company; and that this railroad now transports flowables in C & S containers and must be allowed to move this traffic with full flexibility in their affiliates' auxiliary and supplemental motor service, as proposed. Applicant Long Transportation Company

and four other applicants further contend that bottle caps and grinding balls and rods are not, as specifically found by the examiner, "commodities in bulk" within the meaning of the definition of the term "in bulk" stated in *Mulqueen Contract Carrier Application*, 250 I.C.C. 436.

Also on exceptions protestant Chemical Tank Lines, Inc., together with six other protestants, and C & R Transport Company, jointly with five other protestants, contend that there has been shown no public need for C & S container transportation service proposed by any applicant; that the supporting evidence on this point is wholly speculative and vague; and that protestant tank truckers are ready, willing, and able to provide any service needed by the supporting shippers. In reply, applicants Associated Transport and others contend that the protestants, principally by reason of their lack of suitable equipment and their inability to make available to the shipping public a rate structure relieved of a substantial empty mileage factor, are not in a position to fulfill the needs of the shipping public.

A number of protestants, including Commercial Oil Transport, jointly with Kaw Transport Company; E. Brooke Matlack, Inc., jointly with P. E. Kramme, Inc.;[4] the rail protestants; C & R Transport Company and others; and McKenzie Tank Lines, Inc., contend, collectively, in reply to the applicants' exceptions, that the shipper evidence is too general, vague, and indefinite to justify issuance of new authority to any applicant; that the Commission should require of the applicants, before granting any new authority, the same detailed proof of need therefor as is required of tank truckers when requesting similar authority; that protestants can satisfy the needs of the supporting shippers for the proposed services; and that the applications should be denied. Several protestants argue

[4] Chemical Tank Lines, Inc., together with four other motor protestants indicate by letter that they adopt the Matlack-Kramme reply as their own.

that the failure of nearly half of the 211 applicants, including many of the Nation's largest general commodity carriers, to file exceptions herein indicates their satisfaction with the examiner's recommendations, including his recommended denial of all applications.

We have considered the evidence adduced, the examiner's recommendations, and the exceptions and replies thereto. We find the examiner's statement of facts to be substantially correct; and, as modified herein in light of the exceptions, that statement is adopted as our own.

APPLICANTS' EVIDENCE

As indicated by the examiner, there is no serious dispute in these applications as to the ability of the applicants to afford service of the type proposed. Applicants now conduct extensive operations as motor common carriers of general commodities with various exceptions, providing general freight service, including pickup and delivery, stopoffs in transit, and protective service on commodities requiring temperature control. They operate equipment suitable for the transportation of filled or empty C & S containers, including conventional closed and open-top van trailers, insulated vans, and flat beds, as well as many auxiliary and service vehicles. Generally, they describe a growing trend in materials handling toward use of C & S containers; and they fear that unless they are given free rein, throughout their presently authorized territories, to transport flowable commodities in C & S containers, so as to meet various shippers' evolving needs for transportation, they will lose traffic vital to their continued profitable operations. Applicant Transamerican, for example, indicates that the transportation of sugar between points throughout its system is one of its major sources of revenue. Most of this sugar is imported through such ports as New York City, Baltimore, Md., and Philadelphia, Pa. At the present time this traffic is packaged in 100-pound cloth bags and moves in truckload quantities averaging approximately

32,000 pounds. Transamerican emphasizes that there is a trend among users of sugar to receive their sugar in liquid form; that C & S containers are particularly suitable for transportation of liquid sugar; and that if it is not permitted to make use of these new containers for this type of traffic, without restriction, it stands to lose some of this business, with a resultant seriously adverse effect upon its operations and revenues.

Many applicants have experience in transporting liquid and dry flowables in various C & S containers, particularly in Sealdbins and Sealddrums ranging widely as to size and capacity. In most instances the containers were filled prior to loading onto the carrier's vehicle by the consignor. Additionally, several applicants have transported a substantial volume of flowable freight in Sealdtanks. Associated Transport, for example, transported 14 shipments (weighing about 27,000 pounds each) between July 28, 1959, and February 2, 1960, from Worcester, Mass., to Pittsburgh, Pa. In these, as in most instances of Sealdtank use by the various applicants, the tank was mounted on the carrier's trailer prior to loading by the shipper.

SHIPPER EVIDENCE

Twenty-eight shippers of dry and liquid flowable commodities, including such commodities as vinegar and liquid chocolate, as well as a wide range of industrial chemicals, support these applications. Several of them specifically support particular applicants only—for example, those serving their respective plant locations—but all are of the opinion that general commodity carriers should have unrestricted authority to transport their inbound or outbound flowable materials and products in C & S containers, so as to facilitate the free interchange of such traffic between connecting general commodity carriers. The asserted needs and desires of the 28 supporting shippers, as well as those of the Pennsylvania Railroad Company, are described in detail in appendix D to the examiner's report and need not

be resummarized here. Comparing that appendix with the record, including the various pleadings of the parties filed either prior or subsequent to the issuance of the examiner's report, we find no merit in the contention of applicant Transamerican that the examiner failed to consider the evidence of all of the shippers who appeared in support of its application. In any event we have considered all such evidence in reaching the conclusions expressed in this report.

Many C & S containers are so designed that they can either be filled before or after placement on a trailer. A number of the supporting shippers are making extensive use of this type of container, such as Sealddrums, Sealdbins, Nest-A-Bins, Nava-tainers, tote bins, and the like, in their shipments of dry and liquid flowables. For example, the Ford Motor Company several years ago purchased 70 Sealdbins (with 70-cubic-foot capacities) for granules and powdered plastics moving from suppliers at Pittsfield, Mass., and Canton, Ohio, to its Ypsilanti, Mich., plant. To reduce materials handling as much as possible Ford constructed certain machines at its plant to hoist and hold each Sealdbin in position, about 12 feet off the floor so as to use it as a hopper for feeding the material directly into its production operations. Ford utilizes certain named general commodity carriers to transport these Sealdbins empty to its suppliers, and to return to its plant the filled containers. Its Canton supplier, in most instances, fills the Sealdbin and then loads it with a mechanical lifting device onto the carrier's trailer. In some instances, though, the Sealdbin is premounted on the trailer and then filled by hose or pipe.

Certain of the larger Sealdtank-type containers are filled by shippers prior to being loaded on a trailer, and subsequently turned over to the carrier at origin and delivered by the carrier at destination, as a loaded container. The B. F. Goodrich Rubber Company, for instance, is particularly interested in using Sealdtanks filled in this manner for shipments of liquid latex imported from the Far East.

It has had extensive discussions with steamship companies and has made test shipments using 3,000-gallon Sealdtanks, affixed to large pallets with a view to their possible future use in transporting liquid latex. Presently the imported latex is pumped from the vessel at dockside into drums, tank trucks, or rail tank cars, and then moved to various production plants in the United States. Use of Sealdtanks for this traffic would appreciably reduce handling and storage costs.

Perhaps the most striking feature of the new C & S containers is that they can be used effectively in or upon conventional trailer equipment actually to provide bulk motor transportation of flowable, fungible commodities. The discussion of shipper evidence which follows will be concerned primarily with this type of transport, rather than with the type of service which, according to the findings in the *Western Express* case, general commodity carriers may perform. For clarity, however, other pertinent evidence will be stated. The Penola Oil Company of Detroit, Mich., found it necessary to utilize applicant Transamerican in January 1960, on several shipments of cutting oils moving in Sealdtanks to a customer at Lima, Ohio. A tank-truck protestant herein was unable to provide the necessary tank equipment when tendered the traffic. This shipper therefore called upon Transamerican which made the deliveries satisfactorily in Sealdtanks placed in conventional vans. A total of approximately 16,000 gallons was delivered to Lima in four Sealdtank shipments in a 2-day period, the Sealdtanks in all instances being filled and emptied from their position inside the carrier's cans. Although Transamerican's service was satisfactory, movements to this destination were subsequently discontinued for other reasons.

The Union Carbide Corporation, which has numerous plants located throughout the country, leases more than 3,000 300-cubic-foot Sealdbins in which it ships resins in dry form. Ninety percent of its shipments move by rail and the remainder by general commodity motor carrier.

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It also has been using 3,000-gallon Sealdtanks for the transportation of liquid resins from its South Bound Brook, N. J., plant to Providence, R. I. The Sealdtanks are filled and emptied while on the vehicles. This traffic had previously moved by tank truck, but this shipper considers the use of Sealdtanks in vans equipped with temperature control devices to be superior to tank-truck service because, it feels, the temperature-controlled vans are better able to maintain the critical temperature range of from 35° to 40° F. required for these commodities. It has not requested this type of service from tank truckers.

A division of the Hooker Chemical Company ships a substantial volume of molding compounds, liquid resins, and various chemicals, related to their manufacture, in liquid and dry granular form, in containers and in bulk, from plants at North Tonawanda, N. Y., and Canton, Ohio, to customers and to its own warehouses located throughout the United States. Its warehouses, in turn, regularly reship to customers. The containers most frequently used include 50-pound paper bags, costing about 15 cents each, and fiberboard or steel drums, costing between $2.80 and $8.00 each. It also has been making extensive use of Sealdbin-type containers and will continue to expand its utilization of these and other C & S containers. It owns three Sealdtanks which are used for approximately a dozen movements of liquid resins a month from North Tonawanda to Canton, Providence, Middleton, Wis., and Lake Mills, Iowa. On these movements it has been using Gateway Transportation Company, one of the applicants in this proceeding, together with two other general commodity carriers not parties hereto. It appears that the Lake Mills movement has involved two-line service, with trailer interchange, although the exact details of these arrangements were not disclosed. This shipper is convinced that on shipments of liquid resins to points more than 400 miles from its plant, transportation in Sealdtanks is more economical than motor tank vehicle service. Its success with Sealdtanks has en-

abled it to reduce its private fleet from six to three tank trucks, only one of which, however, is used in interstate transportation.

Monsanto Chemical Company markets more than 1,000 chemical, plastic, and petroleum products throughout the world. In addition to plant locations in a number of foreign countries, it operates 22 plants in the United States. It ships a large volume of freight by motor vehicle, in containers and tank trucks, in interstate and foreign commerce. Many of its products are transportable in Sealdtank-type containers, and it has used Sealdtanks for some shipments of alum from its Everett, Mass., plant, and for certain intraplant movements at Monsanto, Ill. It expects to make extensive use of C & S containers for shipments ranging in quantity from 500 gallons to 7,000 gallons, and it believes that this type of transportation will reduce its freight costs, particularly if such service is made available at rates similar to those charged by general freight carriers for transportation of its products in drums. For example, general commodity carriers have rates of 57 cents per 100 pounds on packaged chemicals, with a minimum of 20,000 pounds, applicable from St. Louis, Mo., to Chicago, Ill., as compared to 84 cents with a 30,000-pound minimum, by tank trucks. The general commodity carrier rate on chemicals from St. Louis to New York is $1.40 a hundred pounds, with a minimum of 25,000 pounds, as compared to approximately $2.50 per 100 pounds by tank truck carriers. Monsanto takes the position that all of the applicants should be authorized to provide a comprehensive network of connecting-line service between points throughout the entire country.

Shawinigan Resins Corporation ships polyvinyl acetate resins from its Springfield, Mass., plant to its own warehouses, and to industrial customers throughout the United States. As demand increases for its products, it plans to produce and ship them also from its new installation at Trenton, Mich. About 35 percent of its present traffic moves in tank cars, 20 percent in motor tank trucks, and

the remainder in heresite lined 55-gallon drums, the latter being both expensive and nonreturnable. Its products can be transported in airtight Sealdtanks and Sealdbins, and some shipments have been made in Sealdtanks with satisfactory results. In April 1960 it made a test shipment, via a general commodity motor carrier (not an applicant in this proceeding) to a Newark, Ohio, customer which previously had been taking deliveries in 55-gallon drums. The Sealdtank was filled by the shipper after placement on the trailer; and at destination the lading (3,500 gallons) was pumped directly from the mounted Sealdtank into 55-gallon drums within a period of 65 minutes. Both the shipper and receiver were highly satisfied with these results. This shipper plans to use Sealdtanks or Sealddrums for shipments ranging from 500 to 2,500 gallons which now move either in drums or tank trucks. At times it has used tank trucks for shipments to points as distant as 1,000 miles, but claims that for distances of more than 300 miles tank-truck service is not economically feasible. It will continue to utilize bulk motor service to points within about 300-mile radius of origin, because it considers the rates for these distances to be competitive with general commodity carriers' container rates.

The Adolph Coors Company and the Coors Porcelain Company, of Golden, Colo., ship and receive a number of products, including bottle caps and porcelain grinding rods and balls as well as liquid and granular materials, all of which are readily transportable in C & S containers. Nava-tainers will be utilized extensively for transporting these materials. The Nava-tainers will be filled prior to loading and will be removed while filled from the trailer by forklift trucks. To a large extent, also, these containers will be used in shippers' conveyor systems in place of previously used hoppers.

The United States Rubber Company, the developer of the "Seald" containers, annually ships and receives an enormous volume of freight suitable for movement in C & S

containers. It operates plants at a number of points in eastern, southern, and midwestern States, has customers at points throughout the United States, and desires the availability of applicants' proposed services between all plant and customer locations. A substantial number of shipments of flowable, fungible commodities have been made from its North Bergen, N. J., Naugatuck, Conn., Painesville, Ohio, and Tonawanda plants in Sealdtanks and Sealdbins.

A division of the General Foods Corporation annually ships about 11 million pounds of chocolate in liquid form, and about 6 million pounds in dry form, from Dorchester, Mass., to points in the eastern and midwestern States. About 5 millions pounds of this total move by tank truck, principally to metropolitan New York. At one time all of its chocolate moved in solid form but, after experimentation, certain tank truckers developed suitable equipment and provided the motor service which the shipper now uses extensively. Liquid chocolate must be transported within a temperature range of 120° to 130° F. During warm weather months, liquid chocolate can be transported successfully in Sealdtanks in temperature-controlled vans. This shipper has used applicant M & M Transportation Company for experimental Sealdtank movements to Newark, N. J., and Philadelphia, Pa.; and applicant Associated Transport for about 15 Sealdtank movements to Pittsburgh, Pa. These latter shipments were made partially as an experiment and partially to supplement rail service which ordinarily is used to Pittsburgh. Under prevailing rate structures this shipper finds that Sealdtank movements to relatively distant points, such as Pittsburgh, costs about $50 a trip less than tank-truck service. Another of its company divisions produces inedible oils and greases at Woburn, Mass., which are shipped to points in Indiana by tank truck. It plans to use Sealdtanks for this transportation when a satisfactory liner for these containers compatible with its products is developed.

The Geigy Corporation during 1959 shipped more than 25 million pounds of freight, including insecticides and

cleaning compounds, from its McIntosh, Ala., plant to destinations throughout the country. About half of this volume was in liquid form, of which 50 percent moved by rail tank car and 10 percent by tank truck. The rest of its liquid traffic moved by motor vehicle in containers ranging from pint sizes to 55-gallon drums. Geigy uses applicant Jack Cole Company for its container shipments throughout that carrier's authorized system, and, for its bulk movements, it uses the services of Hearin Tank Lines, a protestant herein, and Mason & Dixon Tank Lines, Inc., and Alabama Highway Express, Inc. This shipper has accounts in New York City, Chicago, and St. Louis, Mo., which are specifically requesting Sealdtank deliveries, and it desires the proposed service of the applicants to handle such traffic. It is convinced that tank-truck service is not economical for distances of more than 400 miles, and for that reason, especially, it supports these applications.

OPPOSING EVIDENCE

The opposing motor carriers, which specialize in transportation of liquid and dry commodities in bulk, in tank or hopper vehicles, provide bulk service between points in broad operating territories. It is their position that they are ready, willing, and able to furnish any bulk motor transport required by any of the supporting shippers they are authoried to serve, and that there is no factual basis for a conclusion that the tank-truck service now available to such shippers is inadequate in any respect. At the time of the hearing, only two motor protestants were making use of C & S containers in their operations; and of these, only one was providing both the vehicle and container in performing such service. However, protestants have not, on the whole, been requested by the supporting shippers to utilize C & S containers, and they feel, therefore, that there is no justification for granting new competitive authority to perform such apparently unneeded transportation. Most of their certificates or permits are phrased to authorize transportation of named liquid or dry commodities, or

types of commodities, "in bulk," or "in bulk, in tank vehicles," or "in bulk, in tank trucks." In the *Western Express* case, *supra,* it was concluded that motor carriers so authorized are entitled to transport such commodities when they are pumped, poured, dumped, et cetera, into C & S containers premounted on or in trailers, regardless of ownership or control of the containers.

The vast majority of the tank truck protestants do not operate the conventional van or flat-bed equipment necessary for efficient transportation of C & S container traffic, and with few exceptions they have published tariff minima of 4,000 gallons or 28,000 pounds applicable to their transportation of less-than-truckload quantities of authorized commodities. Also, for the most part, they do not have the benefit of return payloads in their operations, meaning that on an average between 40 and 50 percent of their line-haul mileage involves deadhead transportation, a factor reflected in the basic rate structure not only of protestants, but of all motor tank carriers.

A representative summary of services held out by the motor protestants is given in appendix B hereto. Numerous other carriers, in addition to those specified in this appendix, oppose these applications. They are specifically named in the examiner's report and it is not necessary to name them here. However, to the examiner's listing should be added protestant Greenleaf Motor Express, Inc.

DISCUSSION

The first matter to be considered in weighing the merits of applicants' proposals is that neither the restriction precluding transportation of "commodities in bulk" nor that precluding transportation of "commodities requiring special equipment" in an applicant's certificate (which otherwise authorizes transportation of general commodities) necessarily precludes transportation of fungible, flowable commodities, liquid or dry, in the described C & S containers. The rationale of the *Western Express* case, *supra,*

is that when such commodities are tendered to the carrier *in dismounted containers*, as distinguished from a tendering of those commodities *into premounted containers*, the line-haul transportation involved is not bulk transportation; and that, assuming no special equipment is required of the carrier for loading, unloading, or over-the-road transportation, such transportation is not prohibited by the "special equipment" exception usually contained in a general-commodity authorization. A very substantial portion of the transportation in C & S containers for which the supporting shippers here express a need falls within these categories of service; that is, service which is neither bulk transportation nor transportation requiring special equipment. For example, Coors desires a type of transportation inbound to and outbound from Golden in Nava-tainers which will allow the use of such containers as substitutes for bins or hoppers in their production line operations. Since the Nava-tainers will be filled prior to mounting and emptied subsequent to dismounting, their transportation is not prohibited by the usual exceptions contained in the certificates of applicants. The foregoing conclusion renders moot the question whether the bottle caps and porcelain grinding rods and balls shipped by Coors are classifiable as "bulk commodities."

Many other shippers similarly will utilize C & S containers for transportation which applicants generally are already authorized to provide. Nest-A-Bins, Sealddrums, Sealdbins, and related types of C & S containers when filled are readily susceptible to handling by forklift or other mechanical loading and unloading devices. Undoubtedly they will be used widely by shippers of every category, in operations calling for motor transport which is definitely and completely within the recognized fields of service of general commodity carriers, including numerous prospective uses of Sealdtank-type containers such as that planned by Goodrich Company. The applicants, therefore, with a broad, existing right to utilize all types of C & S containers

in their operations—to own and provide them if they find it feasible—are in a position to cultivate an increasingly important area of motor transport which, when its potential is fully realized, should generate a substantial volume of new traffic. In this connection we conclude that to the extent the applicants now are authorized to provide the proposed service, their applications should be dismissed.

The question then arises whether, based upon a broad purpose to promote expanded utilization of these new containers by motor common carriers and shippers, or based upon a definite purpose to satisfy individually established needs for the proposed service, all of the applicants, or any of them, should be authorized to transport commodities in C & S containers in that type of service which is beyond the scope of their presently authorized operations. We have no power to issue new operating rights except in accordance with the standards of section 207 of the act. These standards are basically designed to protect established carriers against the institution of new competing services, unless the established carriers are unable or unwilling to respond to a distinct public need for the new services proposed. Obviously no carrier or group of carriers is entitled to blanket insulation from new competition—especially where such competition results largely from development or refinement of the tools of transportation—but, manifestly, fairness requires that no *carte blanche* authorization be granted which would permit applicants to invade the established field of service of bulk motor carriers whenever or wherever it is to their advantage. The standards of section 207 are concisely stated in the *Pan-American Bus* case *supra*, at page 203:

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the

operations of existing carriers contrary to the public interest.

Here a definite prospective need on the part of the shipping public for motor common carrier transportation of flowable, fungible commodities in C & S containers in quasi-bulk-type service has been shown. However, broad approval of all of these applications or, alternatively, of those in which applicants took specific exceptions to the examiner's recommended denial, obviously is not warranted. Although the tank truck protestants as a group have not thus far engaged any substantial transportation of commodities tendered into premounted C & S containers, they express a willingness and ability to do so, and their right to do so is explicitly affirmed in the *Western Express* case. Moreover, generally the supporting shippers admittedly have not requested this type of service from the protestant carriers.

Apart from their concern over the deadhead factor inherent in the operations of motor tank carriers, the supporting shippers, with the exception of Penola, express no material dissatisfaction with, or any specific complaint concerning, existing bulk motor facilities. A case in point is the liquid chocolate traffic which has been moving in Sealdtanks from Dorchester to Newark, Philadelphia, and Pittsburgh. In some circumstances, particularly in warm weather, there can be decided advantages in the use of Sealdtanks, rather than tank trucks for these shipments. Protestants P. B. Mutrie Motor Transportation, Inc., and P. E. Kramme, Inc., have developed equipment, at substantial cost, to handle this traffic year round, and, so far as the record shows, provide the shipper (General Foods) with satisfactory service. We believe that, at the least, these protestants should be afforded an opportunity to determine whether, on the basis of the need shown in these proceedings and the interpretive findings in the *Western Express* case, their services should be expanded to include C & S container transportation. The same is true, essentially, as to the need for bulk motor service in Sealdtanks demon-

strated by the other supporting shippers. Furthermore, any substantial diversion of flowable fungible traffic from the lines of the protesting tank carriers could result in serious impairment of their operations.

The complaints voiced by Penola refer to only a few isolated lapses in service which, by themselves, are clearly insufficient to constitute the basis for a grant of authority. All things considered, therefore, we conclude that, to the extent they seek authority to provide new service not now authorized, the applications should be denied.

FINDINGS

We find that the authorities held by the applicants as motor common carriers to transport general commodities, except commodities in bulk or those requiring special equipment, include the right to transport loose, flowable commodities when tendered in dismounted collapsible and stackable containers, in circumstances and under the conditions discussed in this report and in *Western Exp. Co. Extension—Sealdtanks, supra;* and that to this extent the applications should be dismissed.

We further find that applicants have failed to establish that the present and future public convenience and necessity require any of their proposed operations which exceed the scope of their presently held rights; and that to this extent the applications should be denied.

An appropriate order will be entered.

COMMISSIONER WALRATH, whom COMMISSIONER WEBB joins, concurring:

My approval of the report is predicated solely upon the view that the majority holdings in the *Western Express* case now represent the law on the subject, although the conclusions in the dissent of Brother Webb, in which I joined, continue to represent my interpretation of what the rights of general commodity carriers should be.

COMMISSIONERS BUSH and TUCKER did not participate.

APPENDIX A

Sealdtanks, Sealdbins, and Sealddrums are trade-name products of the U.S. Rubber Company. They usually are made of 4-ply nlyon tire cord, but they also are made of rayon or dacron cord when necessary for product compatibility. They come in many sizes and shapes. The Transi-cold containers, which are similar in many ways to Sealdtanks, are products of the Goodyear Tire and Rubber Company. The distributor of these containers asserts that it will supply them to customers in any width or length desired. Aromat containers, also a product of Goodyear, are insulated devices which make use of inflated rubber sections to permit transportation of frozen commodities on conventional open-top trailers. Nest-A-Bins, which are trade-name products of the Kaiser Industries Corporation, can be disassembled into two halves for cleaning, or for storing and stacking like paper cups. The Nava-tainers are products of the R & C Investment Company, which is owned by an officer of the Navajo Freight Lines, Inc. They are hexagonal and may be double tiered or stacked.

LIQUID CONTAINERS

Type	Capacity	Length	Width	Filled height	Collapsibility ratio	Tare weight	Approximate price
	Gallons				Percent	Pounds	
Sealdtanks	450	20 ft.	3 ft. 7 in.	27 in.	3+		
	1,000	11 ft.	7 ft. 4 in.	48 in.	3+		
	2,000	19 ft. 6 in.	7 ft. 3 in.	47 in.	3+	650	$1,500
	2,500	23 ft.	7 ft. 4 in.	48 in.	3+		
	3,000	27 ft. 6 in.	7 ft. 4 in.	48 in.	3+		1,700
	3,500	32 ft.	7 ft. 4 in.	48 in.	3+	875	
	4,000	36 ft.	7 ft. 4 in.	48 in.	2-3	1,000	2,000
	4,400	38 ft.	7 ft. 6 in.				
Transi-colds[1]	2,750	22 ft.	7 ft. 3 in.		3	290	2,200
Sealddrum[2]	55				20	35	80
	375				20		
	500				20	145	275
	1,000				20		
Nest-A-Bin	400		52.5 in.[3]	63.2 in.	25	198	295
	550		52.5 in.[3]	77.5 in.	25	208	295
	660		52.5 in.[3]	77.5 in.			
Nava-tainer	135		36 in.	41 in.	16.8		100[4]

[1] Other sizes of Transi-colds are in production.

[2] About eight Sealddrum 500's can be loaded on the bed of an ordinary trailer.

[3] Maximum diameter.

[4] Plus cost of liners and rods.

CONTAINERS FOR DRY FLOWABLE PRODUCTS

	Capacity	Length	Diameter	Height	Collapsibility ratio	Tare weight	Approximate cost
	Cubic feet				Percent	Pounds	
Nest-A-Bin	58		52.5 in.	79.5 in.	28	180	$295
	74		52.5 in.	93.7 in.	25	183	295
Sealdbins	300		90 in.	99 in.	10	450	675
	70		48 in.	82 in.	15	180	465
Nava-tainer	17.5		36 in.	41 in.	16.8	45	100
Aromat		8 ft.	8 ft. (others)	7 ft.	15		

APPENDIX B

Commercial Oil Transport, of Fort Worth, Tex., is authorized to transport various vegetables oils, animal fats, and other specified commodities in bulk within a territory extending throughout southwestern States and into southern, eastern and midwestern States. Terminals are maintained at Fort Worth and Sherman, Tex., Oklahoma City and Enid, Okla., and Jacksonville, Ill. It operates about 150 tank trailers, many of which are compartmented, insulated, and equipped with heating units or other special equipment for the handling of commodities requiring temperature control or unusual handling. During 1959, it transported a total of 340 million pounds of vegetable oil, animal fats, sirups, sugars, and wine, as well as a substantial quantity of inedible products including petroleum products, glue, paints, varnish, and resins.

Commercial Transport, Inc., of Belleville, Ill., is authorized to transport, principally, petroleum and petroleum products, in bulk, from and to various points principally in midwestern and southern States. It operates about 65 tank vehicles suitable for its authorized transportation, and asserts that it has idle equipment available for use throughout the scope of its authorized territory. It is willing to purchase additional equipment if a need therefor arises and welcomes any opportunity to serve shippers through use of collapsible containers.

C & R Transport Company, Inc., of Winnsboro, Tex., is authorized to transport commercial fertilizer, feed ingredient, certain vegetables meals, sulphur, insecticides, bulk salt, and other specified commodities, from and to

specified points and areas in Colorado, New Mexico, Texas, Oklahoma, Louisiana, and Arkansas. It operates 80 power units and 190 trailers, all specialized for its authorized transportation.

Chemical Tank Lines, Inc., Leaman Transportation Corporation, and Leaman Transportation Company, Inc., are tank truckers under common ownership and management. Collectively, they are authorized to transport numerous liquid commodities including liquid chemicals, coal tar products and petroleum products, as well as dry chemicals and cement from, to, and between various points and areas within the States located generally east of the Mississippi River. As of May 1, 1960, their equipment lists showed a total of 660 tractors and 1,011 semitrailers including insulated tanks, aluminum tanks, rubber lined tanks, and stainless steel tanks. More than 200 of these tank trailers are compartmented in sizes ranging from 500 gallons upwards. Two of its tank trailers have seven compartments each. Since the beginning of their operations, these carriers have worked continuously with shippers in developing new types of equipment to transport new products. In addition, they are in a position to obtain equipment of any type necessary to provide their authorized services. As of December 31, 1959, the companies had a net investment in tangible operating property totaling nearly $6,000,000. At various times one or more of the companies has provided service for 14 of the supporting shippers herein within the scope of their respective operating authorities. None of these shippers has requested them to furnish Sealdtanks for the transportation of their products in bulk.

Clark Tank Lines Company, of Salt Lake City, Utah, is authorized to transport various commodities in bulk, including sulphuric acid, anhydrous ammonia, various other liquid chemicals, and specified petroleum products within the States of Azizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, Wyoming, and Utah. It operates approximately 90 pieces of specialized equipment suitable for bulk transportation.

Denver Chicago Transport Company, Inc., transports, principally, petroleum and petroleum products, chemicals, molasses, and vegetable oils, in bulk, in tank vehicles, from

and to various specified points and areas, generally in Colorado, Utah, Wyoming, South Dakota. Nebraska, Kansas, and Idaho. It operates a total of 157 tractors and more than 200 trailers. This equipment, it avers, is not being used in excess of 60 percent of its potential capacity.

E. Brooke Matlack, Inc., of Philadelphia, is authorized to transport various bulk commodities, both liquid and dry, generally within New England, middle Atlantic, and midwestern States. It operates more than 2,000 pieces of equipment including 1,357 trailers of the following types:

Aluminum	142
Standard iron tanks	596
Standard insulated tanks	31
Stainless steel tanks	68
Hopper trailers	359
Flat trailers	117
Other trailers	44

Terminals are operated at 14 points in Pennsylvania, 10 points in Ohio, and 12 points in New York, Michigan, Maryland, New Jersey, and Virginia. It has been providing bulk transportation service for nine of the supporting shippers within the scope of its authorized territory. It holds itself out to perform transportation regardless of the volume to be transported or the amount to be delivered at any destination. It has cooperated and worked with various shippers and customers in providing new facilities and trailers equipment as their needs for service developed.

Ford Brothers, Inc., of Ironton, Ohio, is engaged in the transportation of liquid petroleum products, in bulk, in tank vehicles, from, to, and between various points and places in midwestern, southern, and middle Atlantic States. It operates approximately 80 tank trailers of various types suitable for its authorized transportation. It avers that it is ready, willing, and able to enage in the transportation of petroleum products by use of collapsible tanks whenever such service is requested by any shipper, or when it is established that handling of its traffic in such equipment is practicable and required. At the time of the hearing, it had not been requested by any shipper to supply such service.

Hearin Tank Lines, Inc., of Baton Rouge, La., is authorized to transport petroleum products and various liquid chemicals, in bulk, in tank vehicles from, to, and between specified points in southern and southernwestern States. It operates a total of 166 trailers of various types, including 65 which are compartmented. No shipper has requested it to inaugurate service using Sealdtanks, but it asserts that it is willing to provide such service if needed. It provides service for several supporting shippers, including the Geigy Corporation on inbound and outbound shipments at its McIntosh, Ala., plant; the U. S. Rubber Company on inbound and outbound shipments at its Baton Rouge, La., plant; Kaiser Aluminum Corporation at Baton Rouge; the Dow Chemical Company from its Plaquemine, La., and Freeport, Tex., plants; the B. F. Goodrich Rubber Company at its Tuscaloosa, Ala., plant; and Monsanto Chemical Company at its Luling, La., and Anniston, Ala., plants.

Ruan Transport Corporation, of Des Moines, Iowa, is authorized to transport liquid petroleum products as well as many other specified commodities, including named liquid chemical and animal and vegetable oils, in bulk, in tank vehicles, from and to specified points and areas in 19 midwestern and southwestern States. It maintains terminals at 22 points in Iowa, Nebraska, Minnesota, Wisconsin, Illinois, and Indiana, and operates more than 400 tank trailers most of which have several compartments.

Kaw Transport Company, of Kansas City, Mo., is authorized to transport petroleum products and liquid chemicals from and to specified points in seven midwestern States. It operates more than 50 tank vehicles, many of them compartmented to handle shipments as small as 500 gallons or 1,000 gallons. It avers that it is affording satisfactory service to all shippers utilizing its facilities, and that it is willing to acquire any additional equipment or devices to meet the needs of shippers.

Liquid Transporters, Inc., of Louisville, Ky., is authorized to transport various liquid commodities, including liquid chemicals and petroleum products, in bulk, in tank vehicles, from certain points in Kentucky to points in Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, Nebraska, North Carolina, Ohio, Okla-

homa, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. It also has authority to move such traffic to Kentucky points from specified points in Ohio, Indiana, and Illinois. It operates approximately 58 tractors and 100 trailers and is in a position to acquire additional equipment if necessary.

The P. B. Mutrie Motor Transportation, Inc., of Waltham, Mass., has authority to transport general commodities, as well as numerous commodities in bulk from and to specified points and areas in New York and the New England States. It maintains terminals at Woodbridge, N. J., Wallingford, Conn., Pawtucket, R.I., Manchester, N.H., Springfield and Waltham, Mass., and Champlain, N.Y. It has been engaged in bulk motor transport since 1927, and has provided that type of service for nine of the supporting shippers herein. It operates a total of 275 tank trailers, representing an investment of about $1.8 million, 7 van-type trailers, and 35 flat beds. It has been participating with the U.S. Rubber Company since 1956 in the experimentation with collapsible rubber tanks. It has owned a total of seven Sealdtanks of which two are still in operation. These Sealdtanks are used with van-type semitrailers. It has been using one of these Sealdtanks to transport liquid alum for the Monsanto Chemical Company from Everett, Mass., to points in Maine and New Hampshire. It also has discussed providing Sealdtank transportation with the U.S. Rubber Company and the Shawinigan Resin Company, but those companies have tendered their C & S containers traffic to general commodity carriers. It participated with the General Foods Corporation in the initial development of tank vehicles for transportation of liquid chocolate, and it presently is providing this type of service for that shipper. Mutrie was not asked by this shipper to use Sealdtanks for this transportation.

P. E. Kramme, Inc., of Monroeville, N. J., is authorized to transport various liquid chemicals, liquid chocolate, and related commodities from and to various specified points and areas in New Jersey, Pennsylvania, New York, and the New England States. Its principal terminal is located at Monroeville, and it has another terminal at Avondale, Pa. It has always specialized in the transportation of liquid edibles, first transporting milk and related products, and then, in 1952, participating in the initial development of temperature-controlled equipment for transporting liquid

chocolate and related products in bulk. It operates a total of 36 tank trailers, most of them of stainless steel construction, insulated, and suitable for hauling milk or chocolate under variable climatic conditions. It has been transporting liquid chocolate and related products for the General Foods Corporation from Dorchester to destinations in New Jersey, Pennsylvania, New York, and Connecticut, as well as to Bryan, Ohio, and Chicago, Ill. It also is performing such transportation for other chocolate shippers but has not been requested to use Sealdtanks by either the General Foods Corporation or any of these other shippers. It asserts that although peak movements of liquid chocolate traffic occur in the winter months, a substantial amount moves throughout the entire year. Kramme fears that if this traffic is diverted during a few months of the year, the adverse effect on its operations will impair the service it makes available throughout the year to other shippers. During 1959, it transported 16,235 tons of chocolate and related commodities within the scope of its authority of which nearly 4,000 tons were handled for General Foods Corporation.

The Petroleum Carrier Corporation, of Jacksonville, Fla., is authorized to transport petroleum products, liquid chemicals, and various other specified liquid commodities in bulk, in tank vehicles, from and to specified points and areas in Georgia, Florida, North Carolina, and South Carolina. It operates 114 tractors and 196 trailers, and has terminals at Jacksonville, Fla., Savannah, Brunswick, Macon, Atlanta, and Bainbridge, Ga., Pensacola, Fla., and Charleston, S.C. It asserts that it is ready, willing, and able to provide any type of bulk motor transportation authorized by its certificates.

Producers Transport Inc., of Benton Harbor, Mich., is authorized to transport petroleum and petroleum products, liquid chemicals, and various other specified liquid products, in bulk, in tank vehicles, principally in the Midwest. It operates approximately 180 tank trailers, including many of the compartmented type, and holds itself out to perform partial pickups from two or more origins for a single shipper and delivery to two or more consignees at destination. No request specifically has been made of it to use Sealdtanks in its operations. It presently is providing service for several of the supporting shippers here-

in, including Union Carbide Corporation and Dow Chemical Company on traffic moving from their Chicago, Whiting, Ind., and Midland, Mich. facilities. It has received no complaint from these shippers concerning its service, and indicates a willingness to purchase and operate Sealdtanks under its present authority if that action is needed to satisfy the reasonable service requests of these or other shippers.

Refiners Transport and Terminal Corporation, of Detroit, Mich., is authorized to transport liquid commodities in bulk, in tank vehicles, including liquid chemicals, petroleum, petroleum products, paints, and various other specified commodities from and to points located principally in the midwestern States, but also in operations extending from and to points in eastern, southern, and northwestern States. It operates 374 tractors and more than 600 tank vehicles, including about 400 with carbon steel linings and maintains terminals at 14 points in Michigan, 10 points in Ohio, 8 points in Indiana, and 3 points in Illinois. It has been providing service for seven of the supporting shippers herein, and asserts that it is willing and able to provide any bulk transportation requested within the scope of its operating authority including Sealdtank transportation. It presently serves Penola Oil Company of Detroit, transporting petroleum oils, solvents, and corn oil, and takes the position that it is providing a completely satisfactory service for that shipper. As regards Penola's complaint that it failed to provide a tank truck shipper at the time requested in January 1960, it alleges that Penola's request was communicated to it at too late an hour in the morning to be honored. In another connection its experience, generally, is that a truckload quantity varies depending upon the requirements of the shipper or consignee. Truckloads of automotive undercoating and sound deadening compound average about 1,800 gallons. Truckloads of phosphoric acid, usually about 2,900 gallons, sometimes range as high as 3,500 gallons. Truckloads of sulphuric acid vary from 3,500 to 3,800 gallons. Truckloads of alcohol run from a minimum of 500 to a maximum of 6,000 gallons. Truckloads of paints and resins range from 1,000 gallons to 5,000 gallons. In some cases a 3,000-gallon truckload of resin is made up of two 1,500-gallon shipments of different types of resin in a compartmented tank trailer.

Robertson Tank Lines, Inc., of Houston, Tex., is authorized to transport various liquid commodities, including liquid chemicals, petroleum products, ink, liquid sugar, and vegetable oils from, to, and between various points and areas principally within southern and southwestern States. It operates 217 tractors and 265 trailers, including many of the compartmented type. Its trailer equipment also includes 16 dump trailers and 25 open-top vans. Robertson asserts that it has transported many shipments of less than 1,000 gallons. It has terminals located at seven points in Texas, and at Lake Charles, La., and Cincinnati, Ohio.

Rogers Cartage Co. of Chicago, Ill., is authorized to transport various commodities in bulk from, to, and between various points and areas in midwestern and southern States. Its "petroleum division" transports gasoline, petroleum, fuel oil, distillate fuel oil, residual fuel oil, lubricating oils, liquefied petroleum gas, transformer oils, and asphalt, while its "chemical division" transports liquid chemicals, paint and paint products, vegetable oils, liquid strach, and various other specified commodities. The chemical division maintains terminals at points in Illinois, Michigan, Missouri, and Kentucky, and the petroleum division also maintains separate terminals at points in Illinois, Indiana, and Michigan. It operates a total of approximately 380 tank trailers and 325 tractor units. One of its units is a hopper vehicle for hauling dry commodities. It presently serves six of the supporting shippers herein. During 1959, protestant's chemical division transported approximately 36,000 shipments for 165 shippers, from 54 origins to authorized destination points. In the same period, the petroleum division transported approximately 84,000 shipments for 20 shippers from 26 origin points. It fears that grants of the authority sought would result in the diversion of some of its traffic to applicants, causing an adverse effect on its operations. It has received no requests from any of its shippers for service utilizing the new C & S containers.

APPENDIX C

MC-151 (Sub-No. 11), Lovelace Truck Service, Inc.
MC-239 (Sub-No. 21), Ecklar-Moore Express, Inc.
MC-263 (Sub-No. 108), Garrett Freight Lines, Inc.
MC-504 (Sub-No. 32), Harper Motor Lines, Inc.
MC-665 (Sub-No. 60), Missouri-Arkansas Trans. Co.
MC-703 (Sub-No. 11), Hincheliff Motor Service, Inc.
MC-730 (Sub-No. 157), Pacific Intermountain Express Co.
MC-873 (Sub-No. 34), Sooner Freight Lines.
MC-966 (Sub-No. 11), Capitol Truck Lines, Inc.
MC-986 (Sub-No. 12), Kansas Nebraska Express, Inc.
MC-1124 (Sub-No. 162), Herrin Transportation Co.
MC-1168 (Sub-No. 26), The Baltimore Transfer Co. of Baltimore City.
MC-1222 (Sub-No. 18), The Reinhardt Transfer Co.
MC-1263 (Sub-No. 12), McCarty Truck Line, Inc.
MC-1375 (Sub-No. 8), Bell Lines, Inc.
MC-1380 (Sub-No. 7), Colonial Motor Freight Line, Inc.
MC-1470 (Sub-No. 7), Columbus & Chicago Motor Freight, Inc.
MC-1550 (Sub-No. 13), Charles Hildenbrand & Elias Hildenbrand doing business as Advance Express Co. (Reentitled Advance Express, Inc.)
MC-1968 (Sub-No. 71), Braswell Freight Lines, Inc.
MC-2136 (Sub-No. 15), Clemans Truck Line, Inc.
MC-2203 (Sub-No. 2), Needes Express, Inc., renumbered and reentitled No. MC-71536 (Sub-No. 6), Arrow Carrier Corporation.
MC-2226 (Sub-No. 91), Red Arrow Freight Lines, Inc.
MC-2228 (Sub-No. 39), Merchant's Fast Motor Lines, Inc.
MC-2245 (Sub-No. 3), The O. K. Trucking Company.
MC-2253 (Sub-No. 19), Carolina Freight Carriers Corp.
MC-2306 (Sub-No. 4), Strickland Motor Freight Lines, Inc.
MC-2401 (Sub-No. 19), Motor Freight Corporation.
MC-2472 (Sub-No. 4), The Blake Motor Lines, Inc.
MC-2754 (Sub-No. 11), Neuendorf Transportation Co.
MC-2815 (Sub-No. 17), Penntruck Company, Inc.
MC-2894 (Sub-No. 17), Red Star Transit Company, Inc.
MC-2962 (Sub-No. 23), A. & H. Truck Line, Inc.
MC-2986 (Sub-No. 20), Indianapolis & Southern Motor Express, Incorporated.
MC-2990 (Sub-No. 15), Blue Arrow Transport Lines, Inc.
MC-3005 (Sub-No. 7), Chicago-Kansas City Freight Line, Inc.

MC-3062 (Sub-No. 15), L. A. Tucker Truck Lines, Inc.
MC-3341 (Sub-No. 20), Lake Motor Freight Lines, Inc.
MC-3379 (Sub-No. 40), Snyder Bros. Motor Freight, Inc.
MC-3419 (Sub-No. 8), The Cleveland, Columbus, & Cincinnati Highway, Inc.
MC-3420 (Sub-No. 5), Motor Express, Inc.
MC-3560 (Sub-No. 14), General Expressways, Inc.
MC-3718 (Sub-No. 3), Merchants Trucking Company.
MC-3799 (Sub-No. 11), Elliot Motor Lines, renumbered and reentitled No. MC-42329 (Sub-No. 143), Hayes Freight Lines, Inc.
MC-3833 (Sub-No. 10), The New Dixie Lines, Inc.
MC-4804 (Sub-No. 9), The Liberty Highway Company
MC-5888 (Sub-No. 20), Mid-American Truck Lines, Inc.
MC-6945 (Sub- No. 27), The National Transit Corporation.
MC-8964 (Sub-No. 14), Witte-Transportation Company.
MC-9876 (Sub-No. 16), National Transportation Co.
MC-10343 (Sub-No. 9), Churchill Truck Lines, Inc.
MC-10472 (Sub-No. 19), Byers Transportation Co., Inc.
MC-10761 (Sub-No. 84), Transamerican Freight Lines, Inc.
MC-10872 (Sub-No. 26), Be-MacTransport Company, Inc.
MC-10875 (Sub-No. 10), Branch Motor Express Company.
MC-10928 (Sub-No. 37), Southern-Plaza Express, Inc.
MC-11184 (Sub-No. 11), McDaniel Freight Lines, Inc.
MC-11220 (Sub-No. 66), Gordons Transports, Inc.
MC-13569 (Sub-No. 7), The Lake Shore Motor Freight Co.
MC-13925 (Sub-No. 5), Mound City Forwarding Company, Inc. reentitled Jones Truck Line, Inc.
MC-14252 (Sub-No. 11), Commercial Motor Freight, Inc.
MC-14421 (Sub-No. 18), Chicago Dubuque Motor Transportation Company.
MC-16344 (Sub-No. 7), Keystone Motor Express, Inc.
MC-17398 (Sub-No. 3), The H. T. Smith Express Company.
MC-17481 (Sub-No. 19), Moore Motor Freight Lines, Inc.
MC-17778 (Sub-No. 31), Yale Transport Corp.
MC-19201 (Sub-Nos. 113, 115, and 116), Pennsylvania Truck Lines, Inc.
MC-19553 (Sub-No. 22), Knox Motor Service, Inc.
MC-20824 (Sub-No. 15), Commercial Motor Freight, Inc. of Indiana.
MC-21571 (Sub-No. 23), Scherer Freight Lines, Inc.
MC-24379 (Sub-No. 26), Long Transportation Company.
MC-25567 (Sub-No. 44), Hancock-Trucking, Inc.

MC-26621 (Sub-No. 10), Northern Transportation Company, reentitled Gateway Transportation Company.
MC-27970 (Sub-No. 32), Chicago Express, Inc.
MC-28008 (Sub-No. 4), Midwest Freight Forwarding Co., Incorporated.
MC-28813 (Sub-No. 21), Motor Express, Inc., of Indiana.
MC-29555 (Sub-No. 34), Briggs Transportation Co.
MC-29910 (Sub-No. 51), Arkansas-Best Freight System, Inc.
MC-30091 (Sub-No. 39), Miller & Miller Motor Freight Lines, renumbered and reentitled No. MC-48958 (Sub-No. 43), Illinois-California Express, Inc.
MC-30204 (Sub-No. 16), Hemmingway Brothers Interstate Trucking Company.
MC-30867 (Sub-No. 169), Central Freight Lines, Inc.
MC-31389 (Sub-No. 47), McLean Trucking Company.
MC-32562 (Sub-No. 16), Point Express, Inc.
MC-33278 (Sub-No. 10), Lee Transportation Company.
MC-33520 (Sub-No. 8), Follmer Trucking Company.
MC-33641 (Sub-No. 40), Interstate Motor Lines, Inc.
MC-35334 (Sub-No. 46), Cooper-Jarrett, Inc.
MC-35469 (Sub-No. 21), Modern Transfer Co., Inc.
MC-35484 (Sub-No. 41), Viking Freight Company.
MC-35737 (Sub-No. 8), Cassell Transfer & Storage Co.
MC-36436 (Sub-No. 30), Moland Bros. Trucking Co.
MC-36832 (Sub-No. 12), American Transit Lines, Inc.
MC-37929 (Sub-No. 5), Western Trucking Company.
MC-38170 (Sub-No. 18), White Star Trucking, Inc.
MC-38183 (Sub-No. 42), Wheelock Bros., Inc.
MC-38372 (Sub-No. 4), Smock Transportation Co., Inc.
MC-38551 (Sub-No. 13), Ramus Trucking Line, Inc.
MC-39300 (Sub-No. 3), Middle States Motor Freight, Inc.
MC-40235 (Sub-No. 19), I.R.C. & D. Motor Freight, Inc.
MC-40302 (Sub-No. 29), Federal Express, Inc.
MC-41432 (Sub-No. 82), East Texas Motor Freight Lines, Inc.
MC-42261 (Sub-No. 40), Langer Transport Corp.
MC-42289 (Sub-No. 2), Lombard Bros. Inc.
MC-42329 (Sub-No. 141), Hayes Freight Lines, Inc.
MC-43421 (Sub-No. 24), Dohrn Transfer Company.
MC-43442 (Sub-No. 12), Transportation Service, Inc.
MC-43475 (Sub-No. 43), Glendenning Motorways, Inc.
MC-43654 (Sub-No. 45), Dixie Ohio Express, Inc.

MC-43676 (Sub-No. 2), The Darcey Transportation Co., Inc.
MC-44128 (Sub-No. 26), The Transport Corporation.
MC-44290 (Sub-No. 13), Husmann & Roper Freight Lines, Inc.
MC-44447 (Sub-No. 15), Suburban Motor Freight, Inc.
MC-44592 (Sub-No. 19), Middle Atlantic Transportation Co., Incorporated.
MC-44605 (Sub-No. 12), Milne Truck Lines, Inc.
MC-45657 (Sub-No. 23), Pie-Walsh Freight Co.
MC-46054 (Sub-No. 73), Brown Express.
MC-47038 (Sub-No. 18), Ship-By-Truck Company, doing business as Graham Ship-By-Truck Co.
MC-47389 (Sub-No. 15), Federal Truck Lines, Inc.
MC-48958 (Sub-No. 36), Illinois-California Express, Inc.
MC-49387 (Sub-No. 12), Orscheln Bros. Truck Lines, Inc.
MC-50034 (Sub-No. 25), Courier Express, Inc.
MC-51255 (Sub-No. 16), Haeckl's Express, Inc.
MC-52629 (Sub-No. 42), Huber & Huber Motor Express, Inc.
MC-52877 (Sub-No. 5), Chicago-St. Louis Express, Inc.
MC-52958 (Sub-No. 13), Hennepin Transportation Co., Inc.
MC-53965 (Sub-Nos. 19 and 21), Graves Truck Line, Inc.
MC-55842 (Sub-No. 6), Superior Freight Lines, Inc.
MC-55848 (Sub-No. 33), Huckabee Transport Corp.
MC-55873 (Sub-No. 30), Great American Transport, Inc.
MC-55896 (Sub-No. 7), Ray Williams Freight Lines, Inc.
MC-59185 (Sub-No. 23), Highway Express, Inc.
MC-59485 (Sub-No. 51), Darling Transfer, Inc.
MC-59583 (Sub-No. 86), the Mason & Dixon Lines, Inc.
MC-59680 (Sub-No. 126), Strickland Transportation Co., Inc.
MC-59894 (Sub-No. 18), Texas-Arizona Motor Freight, Inc.
MC-59957 (Sub-No. 28), Motor Freight Express.
MC-60012 (Sub-No. 48), Rio Grande Motor Way, Inc.
MC-60319 (Sub-No. 7), Murdock & Hatch Motor Transport, Inc.
MC-60393 (Sub-No. 16), Central Transfer Company.
MC-61264 (Sub-No. 9), Pilot Freight Carriers, Inc.
MC-61440 (Sub-No. 72), Lee Way Motor Freight, Inc.
MC-62835 (Sub-No. 13), C.E.S. Truck Lines, Inc.
MC-64994 (Sub-No. 31), Hennis Freight Lines, Inc.
MC-65580 (Sub-No. 9), Mushroom Transportation Co., Inc.
MC-67111 (Sub-No. 12), Kain's Motor Service Corp.

MC-67818 (Sub-No. 64), Michigan Express, Inc.
MC-68078 (Sub-No. 16), Central Motor Express, Inc.
MC-68370 (Sub-No. 5), Larson Transportation Co.
MC-68715 (Sub-No. 11), Summit Fast Freight, Inc., re-entitled Lee Way Motor Freight of Indiana, Inc.
MC-68909 (Sub-No. 59), Decatur-Seaway Motor Express, Inc.
MC-69116 (Sub-No. 49), Spector Freight System, Inc.
MC-69275 (Sub-No. 32), M & M Transportation Co.
MC-69281 (Sub-No. 37), The Davidson Transfer & Storage Co.
MC-69901 (Sub-No. 9), Newsom Trucking Co., Inc.
MC-70451 (Sub-No. 215), Watson Bros. Transportation Co., Incorporated.
MC-71478 (Sub-No. 25), The Chief Freight Lines Co.
MC-71516 (Sub-No. 65), Alabama Highway Express, Inc.
MC-71536 (Sub-No. 4), Arrow Carrier Corporation.
MC-72140 (Sub-No. 39), Shippers Dispatch, Inc.
MC-72300 (Sub-No. 30), Lee-American Freight System, Inc.
MC-73262 (Sub-No. 13), Merchants Freight System, Inc.
MC-73464 (Sub-No. 85), Jack Cole Company.
MC-74120 (Sub-No. 7), Porto Transport, Inc.
MC-75320 (Sub-No. 90) Campbell Sixty-Six Express, Inc.
MC-75406 (Sub-No. 16), Superior Forwarding Co., Inc.
MC-76032 (Sub-No. 142), Navajo Freight Lines, Inc.
MC-76177 (Sub-No. 272), Baggett Transportation Co.
MC-76564 (Sub-No. 64), Hill Lines, Inc., renumbered and reentitled No. MC-48958 (Sub-No. 44), Illinois-California Express, Inc.
MC-78632 (Sub-No. 108), Hoover Motor Express Co., Inc.
MC-78712 (Sub-No. 7), Miller Transportation, Inc.
MC-80382 (Sub-No. 25), Brooks Transportation Co., Inc.
MC-80430 (Sub-No. 94), Gateway Transportation Co.
MC-85749 (Sub-No. 10), Decatur Transit Truck Line, Inc.
MC-97369 (Sub-No. 5), Brooks Truck Lines, Inc.
MC-97699 (Sub-No. 12), Barber Transportation Co.
MC-97788 (Sub-No. 3), Hamburger Motor Express, Inc.
MC-103017 (Sub-No. 15), Mercury Motor Freight, Inc.
MC-104004 (Sub-No. 140), Associated Transport, Inc.
MC-106117 (Sub-No. 4), Rumpf Truck Line, Inc.
MC-106194 (Sub-No. 10), O. W. Horn, doing business as Horn Transportation.
MC-106451 (Sub-No. 4), Cook Motor Lines, Inc.

MC-106456 (Sub-No. 29), Super Service Motor Freight Co., Inc.
MC-106943 (Sub-No. 67), Eastern Express, Inc.
MC-106977 (Sub-No. 23), Ryder Truck Lines of Louisiana, Inc.
MC-107158 (Sub-No. 8), Dennis Truck Lines, Inc.
MC-107475 (Sub-No. 43), Dance Freight Lines, Inc.
MC-107500 (Sub-No. 44), Burlington Truck Lines, Inc.
MC-107511 (Sub-No. 8), Indianapolis-Kansas City Motor Express Company.
MC-108158 (Sub-No. 49), Mid-Continent Freight Lines, Inc.
MC-108461 (Sub-No. 83), Whitfield Transportation, Inc.
MC-108586 (Sub-No. 48), Steffke Freight Co.
MC-108905 (Sub-No. 19), Jasper & Chicago Motor Express, Inc.
MC-109095 (Sub-No. 8), Anderson Motor Service, Inc.
MC-109265 (Sub-No. 8), W. L. Mead, Inc.
MC-109533 (Sub-No. 12), Overnite Transportation Co.
MC-109538 (Sub-No. 12), Chippewa Motor Freight, Inc.
MC-109564 (Sub-No. 6), Lyons Transportation Co.
MC-109914 (Sub-No. 16), Dundee Truck Line, Inc.
MC-110264 (Sub-No. 18), Albuquerque Phoenix Express, Inc.
MC-110325 (Sub-No. 23), Transcon Lines.
MC-110683 (Sub-No. 13), Smith's Transfer Corporation.
MC-111383 (Sub-No. 8), Braswell Motor Freight Lines, Inc.
MC-111557 (Sub-No. 23), Karl E. Momsen doing business as Momsen Trucking Co.
MC-111594 (Sub-No. 15), Central Wisconsin Motor Transport Company.
MC-111871 (Sub-No. 3), Southeastern Freight Lines.
MC-113639 (Sub-No. 4), Carbon Motorway, Inc.
MC-114238 (Sub-No. 3), Ohio Southern Express, Inc.
MC-115093 (Sub-No. 1), Mercury Motor Express, Inc. (Tampa, Fla.).

APPENDIX E

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 28th day of September, A. D. 1961.

GROUP I

No. MC-8902 (Sub-No. 12)
THE WESTERN EXPRESS COMPANY EXTENSION—SEALDTANKS

No. MC-29120 (Sub-No. 56)
WILSON STORAGE AND TRANSFER CO., EXTENSION—SEALDTANKS

No. MC-59852 (Sub-No. 11)
ALL STATES FREIGHT, INC., EXTENSION—SEALDTANKS

No. MC-2202 (Sub-No. 173)
ROADWAY EXPRESS, INC., EXTENSION—SEALDTANKS

No. MC-74721 (Sub-No. 69)
MOTOR CARGO, INC., EXTENSION—SEALDTANKS

No. MC-111231 (Sub-No. 38)
JONES TRUCK LINE, INC., EXTENSION—SEALDTANKS

No. MC-69274 (Sub-No. 4)
M. AND R. TRANSPORTATION CO., INC., EXTENSION—SEALDTANKS

No. MC-105265 (Sub-No. 42)
DENVER-AMARILLO RED BALL MOTOR FREIGHT, INC., EXTENSION—SEALDTANKS
(renumbered and reentitled)

No. MC-2229 (Sub-No. 103)
RED BALL MOTOR FREIGHT, INC., EXTENSION—SEALDTANKS

No. MC-2229 (Sub-No. 97)
RED BALL MOTOR FREIGHT, INC., EXTENSION—SEALDTANKS

No. MC-64650 (Sub-No. 16)
W. T. COWAN, INCORPORATED, EXTENSION—SEALDTANKS

No. MC-29566 (Sub-No. 59)
SOUTHWEST FREIGHT LINES, INC., EXTENSION—SEALDTANKS

No. MC-22229 (Sub-No. 27)
TERMINAL TRANSPORTATION COMPANY, INC., EXTENSION—SEALDTANKS

No. MC-46280 (Sub-No. 40)
DARLING FREIGHT, INC., EXTENSION—SEALDTANKS

No. MC-112713 (Sub-No. 82)
YELLOW TRANSIT FREIGHT LINES, INC., EXTENSION—SEALDTANKS

GROUP II

No. MC-82 (Sub-No. 5)
BEST WAY OF INDIANA, INC., EXTENSION—COLLAPSIBLE AND STACKABLE CONTAINERS (AND 210 OTHER PROCEEDINGS NAMED IN APPENDIX A)

GROUP III

No. MC-64112 (Sub-No. 8)
NORTHEASTERN TRUCKING COMPANY EXTENSION—SEALDTANKS

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of United States Rubber Company, intervener in No. MC-8902 (Sub-No. 12), and the 13 other proceedings included in Group I, filed Aprii 27, 1961, for reconsideration;

(2) Petition of The Regular Common Carrier Conference of American Trucking Associations, Inc., intervener in No. MC-8902 (Sub-No. 12), and the 13 other proceedings included in Group I, filed April 28, 1961, for reconsideration;

(3) Petition of Durez Plastics Division of Hooker Chemical Corporation, filed April 28, 1961, for leave to intervene and to file tendered petition for reconsideration in No. MC-8902 (Sub-No. 12) and 13 other proceedings included in Group I;

(4) Petition of Durez Plastics Division of Hooker Chemical Corporation, tendered for filing April 28, 1961, for reconsideration in No. MC-8902 (Sub-No. 12) and the 13 other proceedings included in Group I;

(5) Joint petition of applicants in Nos. MC-8902 (Sub-No. 12), MC-29120 (Sub-No. 56), MC-59852 (Sub-No. 11), MC-2202 (Sub-No. 173), MC-74721 (Sub-No. 69), MC-69274 (Sub-No. 4), MC-2229 (Sub No. 103), MC-2229 (Sub-No. 97), MC-64650 (Sub-No. 16), MC-22229 (Sub-No. 27), MC-46280 (Sub-No. 40), and MC-112713 (Sub-No. 82), and Associated Transport, Inc., intervener, filed April 28, 1961, for (a) reconsideration of proceedings named in Group I, and (b) consideration and disposition thereof with the proceedings named in Group II above;

(6) Joint petition of applicants in Nos MC-104004 (Sub-No. 140), MC-108158 (Sub-No. 49), MC-80430 (Sub-No. 94), MC-61440 (Sub-No. 72), MC-873 (Sub-No. 34), MC-68715 (Sub-No. 11), MC-3419 (Sub-No. 8), MC-3420 (Sub-No. 5), MC-28813 (Sub- No. 21), MC-75320 (Sub-No. 90), MC-10761 (Sub-No. 84), and MC-703 (Sub-No. 11), filed June 9, 1961, (a) for reconsideration of proceedings named in Group II, and (b) for consideration and disposition thereof with the proceedings named in Group I above;

(7) Joint petition of applicants in Nos. MC-97788 (Sub-No. 3), MC-504 (Sub-No. 32), MC-55848 (Sub-No. 33), MC-114238 (Sub-No. 3), and MC-109533 (Sub-No. 12), filed June 9, 1961, for reconsideration;

(8) Petition of The Regular Common Carrier Conference of American Trucking Associations, Inc., intervener, in No. MC-82 (Sub-No. 5) and the 210 other proceedings included in Group II filed June 9, 1961, for reconsideration;

(9) Joint petition of applicants in Nos. MC-31389 (Sub-No. 47), MC-42329 (Sub-Nos. 141 & 143), MC-1375 (Sub-No. 8), MC-110683 (Sub-No. 13), MC-30204 (Sub-No. 16), MC-80382 (Sub-No. 25), MC-32562 (Sub-No. 16), and MC-108461 (Sub-No. 83), filed June 12, 1961, (a) for reconsideration of proceedings named in Group II, (b) for leave to intervene in the proceedings named in Group I above, and (c) for consideration and disposition of the proceedings named in Groups I and II in a consolidated proceeding;

(10) Joint petition of applicants in Nos. MC-106943 (Sub-No. 67), MC-50034 (Sub-No. 25), MC-108905 (Sub-No. 19), and MC-69901 (Sub-No. 9), filed June 12, 1961, for reconsideration;

(11) Petition of The Regular Common Carrier Conference of American Trucking Associations, Inc., intervener in No. MC-64112 (Sub-No. 8), filed June 16, 1961, for reconsideration;

(12) Joint reply by National Tank Truck Carriers, Inc. and 12 named motor carriers, protestants, filed May 18, 1961, to petitions in (1), (2), and (5);

(13) Reply by Midwest Emery Freight System, Inc., protestant, filed May 18, 1961, to petitions in (1), (2), and (5);

(14) Joint reply by Class I Rail Carriers in Western District, protestants, filed May 19, 1961, to petitions in (1), (2), (3), (4), and (5);

(15) Joint reply by Class I Rail Carriers in Western District, protestants, filed June 28, 1961, to petitions in (6), (8), (9) and (10) above;

(16) Joint reply by National Tank Truck Carriers, Inc. and 16 motor carriers, protestants, filed July 10, 1961, to petitions in (6), (7), (8), (9) and (10);

(17) Joint reply by Chemical Tank Lines, Inc. and Leaman Transportation Corporation, protestants, filed July 10, 1961, to petition in (11);

(18) Reply by National Tank Truck Carriers, Inc., protestant, filed July 10, 1961, to petition in (11);

and good cause appearing therefor:

It is ordered, That petitioners in (3) above be, and they are hereby, permitted to intervene in the proceedings named in Group I above with the right to appear and participate in all further proceedings therein;

It is further ordered, That the petition in (4) above be, and it is hereby, accepted for filing;

It is further ordered, That the petitions in (1), (2), (4), (5), (6), (7), (8), (9), (10), and (11), be, and they are hereby, denied, for the reasons (A) that the findings of the Commission in its report of March 22, 1961, embracing the proceedings in Group I above, the findings of the Commission in its report of April 28, 1961, embracing the proceedings in Group II above, and the findings of Division I

in its report of May 11, 1961, in No. MC-64112 (Sub-No. 8) are in accordance with the evidence and the applicable law, and (B) that no sufficient cause appears (a) for permitting petitioners in (9) above to intervene in the Group I proceedings, or (b) for reopening any of the proceedings for reconsideration or for consolidating the proceedings named in Groups I and II for disposition in a single proceeding.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX[1]

MC-151 (Sub-No. 11), Lovelace Truck Service, Inc.
MC-239 (Sub-No. 21), Ecklar-Moore Express, Inc.
MC-263 (Sub-No. 108), Garrett Freight Lines, Inc.
MC-504 (Sub-No. 32), Harper Motor Lines, Inc.
MC-665 (Sub-No. 60), Missouri-Arkansas Trans. Co.
MC-703 (Sub-No. 11), Hinchcliff Motor Service, Inc.
MC-730 (Sub-No. 157), Pacific Intermountain Express Co.
MC-873 (Sub-No. 34), Sooner Freight Lines.
MC-966 (Sub-No. 11), Capitol Truck Lines, Inc.
MC-986 (Sub-No. 12), Kansas Nebraska Express, Inc.
MC-1124 (Sub-No. 162), Herrin Transportation Co.
MC-1168 (Sub-No. 26), The Baltimore Transfer Co. of Baltimore City.
MC-1222 (Sub-No. 18), The Reinhardt Transfer Co.
MC-1263 (Sub-No. 12), McCarty Truck Line, Inc.
MC-1375 (Sub-No. 8), Bell Lines, Inc.
MC-1380 (Sub-No. 7), Colonial Motor Freight Line, Inc.
MC-1470 (Sub-No. 7), Columbus & Chicago Motor Freight, Inc.
MC-1550 (Sub-No. 13), Charles Hildenbrand & Elias Hildenbrand doing business as Advance Express Co. (Reentitled Advance Express, Inc.)

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[1] This Appendix embraces the 210 other applications identified on sheet 1 hereof. Each proceeding is entitled "Extension—Collapsible and Stackable Containers," but is here identified by its short title.

MC-1968 (Sub-No. 71), Braswell Freight Lines, Inc.
MC-2136 (Sub-No. 15), Clemans Truck Line, Inc.
MC-2203 (Sub-No. 2), Needes Express, Inc., renumbered and reentitled No. MC-71536 (Sub-No. 6), Arrow Carrier Corporation.
MC-2226 (Sub-No. 91), Red Arrow Freight Lines, Inc.
MC-2228 (Sub-No. 39), Merchant's Fast Motor Lines, Inc.
MC-2245 (Sub-No. 3), The O. K. Trucking Company.
MC-2253 (Sub-No. 19), Carolina Freight Carriers Corp.
MC-2306 (Sub-No. 4), Strickland Motor Freight Lines, Inc.
MC-2401 (Sub-No. 19), Motor Freight Corporation.
MC-2472 (Sub-No. 4), The Blake Motor Lines, Inc.
MC-2754 (Sub-No. 11), Neuendorf Transportation Co.
MC-2815 (Sub-No. 17), Penntruck Company, Inc.
MC-2894 (Sub-No. 17), Red Star Transit Company, Inc.
MC-2962 (Sub-No. 23), A. & H. Truck Line, Inc.
MC-2986 (Sub-No. 20), Indianapolis & Southern Motor Express, Incorporated.
MC-2990 (Sub-No. 15), Blue Arrow Transport Lines, Inc.
MC-3005 (Sub-No. 7), Chicago-Kansas City Freight Line, Inc.
MC-3062 (Sub-No. 15), L. A. Tucker Truck Lines, Inc.
MC-3341 (Sub-No. 20), Lake Motor Freight Lines, Inc.
MC-3379 (Sub-No. 40), Snyder Bros. Motor Freight, Inc.
MC-3419 (Sub-No. 8), The Cleveland, Columbus, & Cincinnati Highway, Inc.
MC-3420 (Sub-No. 5), Motor Express, Inc.
MC-3560 (Sub-No. 14), General Expressways, Inc.
MC-3718 (Sub-No. 3), Merchants Trucking Company.
MC-3799 (Sub-No. 11), Elliot Motor Lines, renumbered and reentitled No. MC-42329 (Sub-No. 143), Hayes Freight Lines, Inc.
MC-3833 (Sub-No. 10), The New Dixie Lines, Inc.
MC-4804 (Sub-No. 9), The Liberty Highway Company
MC-5888 (Sub-No. 20), Mid-American Truck Lines, Inc.
MC-6945 (Sub-No. 27), The National Transit Corporation.
MC-8964 (Sub-No. 14), Witte-Transportation Company.
MC-9876 (Sub-No. 16), National Transportation Co.,
MC-10343 (Sub-No. 9), Churchill Truck Lines, Inc.
MC-10472 (Sub-No. 19), Byers Transportation Co., Inc.
MC-10761 (Sub-No. 84), Transamerican Freight Lines, Inc.
MC-10872 (Sub-No. 26), Be-MacTransport Company, Inc.
MC-10875 (Sub-No. 10), Branch Motor Express Company.
MC-10928 (Sub-No. 37), Southern-Plaza Express, Inc.

MC-11184 (Sub-No. 11), McDaniel Freight Lines, Inc.
MC-11220 (Sub-No. 66), Gordons Transports, Inc.
MC-13569 (Sub-No. 7), The Lake Shore Motor Freight Co.
MC-13925 (Sub-No. 5), Mound City Forwarding Company, Inc. reentitled Jones Truck Line, Inc.
MC-14252 (Sub-No. 11), Commercial Motor Freight, Inc.
MC-14421 (Sub-No. 18), Chicago Dubuque Motor Transportation Company.
MC-16344 (Sub-No. 7), Keystone Motor Express, Inc.
MC-17398 (Sub-No. 3), The H. T. Smith Express Company.
MC-17481 (Sub-No. 19), Moore Motor Freight Lines, Inc.
MC-17778 (Sub-No. 31), Yale Transport Corp.
MC-19201 (Sub-Nos. 113, 115, and 116), Pennsylvania Truck Lines, Inc.
MC-19553 (Sub-No. 22), Knox Motor Service, Inc.
MC-20824 (Sub-No. 15), Commercial Motor Freight, Inc. of Indiana.
MC-21571 (Sub-No. 23), Scherer Freight Lines, Inc.
MC-24379 (Sub-No. 26), Long Transportation Company.
MC-25567 (Sub-No. 44), Hancock-Trucking, Inc.
MC-26621 (Sub-No. 10), Northern Transportation Company, reentitled Gateway Transportation Company.
MC-27970 (Sub-No. 32), Chicago Express, Inc.
MC-28008 (Sub-No. 4), Midwest Freight Forwarding Co., Incorporated.
MC-28813 (Sub-No. 21), Motor Express, Inc., of Indiana.
MC-29555 (Sub-No. 34), Briggs Transportation Co.
MC-29910 (Sub-No. 51), Arkansas-Best Freight System, Inc.
MC-30091 (Sub-No. 39), Miller & Miller Motor Freight Lines, renumbered and reentitled No. MC-48958 (Sub-No. 43), Illinois-California Express, Inc.
MC-30204 (Sub-No. 16), Hemmingway Brothers Interstate Trucking Company.
MC-30867 (Sub-No. 169), Central Freight Lines, Inc.
MC-31389 (Sub-No. 47), McLean Trucking Company.
MC-32562 (Sub-No. 16), Point Express, Inc.
MC-33278 (Sub-No. 10), Lee Transportation Company.
MC-33520 (Sub-No. 8), Follmer Trucking Company.
MC-33641 (Sub-No. 40), Interstate Motor Lines, Inc.
MC-35334 (Sub-No. 46), Cooper-Jarrett, Inc.
MC-35469 (Sub-No. 21), Modern Transfer Co., Inc.
MC-35484 (Sub-No. 41), Viking Freight Company.
MC-35737 (Sub-No. 8), Cassell Transfer & Storage Co.

MC-36436 (Sub-No. 30), Moland Bros. Trucking Co.
MC-36832 (Sub-No. 12), American Transit Lines, Inc.
MC-37929 (Sub-No. 5), Western Trucking Company.
MC-38170 (Sub-No. 18), White Star Trucking, Inc.
MC-38183 (Sub-No. 42), Wheelock Bros., Inc.
MC-38372 (Sub-No. 4), Smock Transportation Co., Inc.
MC-38551 (Sub-No. 13), Ramus Trucking Line, Inc.
MC-39300 (Sub-No. 3), Middle States Motor Freight, Inc.
MC-40235 (Sub-No. 19), I.R.C. & D. Motor Freight, Inc.
MC-40302 (Sub-No. 29), Federal Express, Inc.
MC-41432 (Sub-No. 82), East Texas Motor Freight Lines, Inc.
MC-42261 (Sub-No. 40), Langer Transport Corp.
MC-42289 (Sub-No. 2), Lombard Bros., Inc.
MC-42329 (Sub-No. 141), Hayes Freight Lines, Inc.
MC-43421 (Sub-No. 24), Dohrn Transfer Company.
MC-43442 (Sub-No. 12), Transportation Service, Inc.
MC-43475 (Sub-No. 43), Glendenning Motorways, Inc.
MC-43654 (Sub-No. 45), Dixie Ohio Express, Inc.
MC-43676 (Sub-No. 2), The Darcey Transportation Co., Inc.
MC-44128 (Sub-No. 26), The Transport Corporation.
MC-44290 (Sub-No. 13), Husmann & Roper Freight Lines, Inc.
MC-44447 (Sub-No. 15), Suburban Motor Freight, Inc.
MC-44592 (Sub-No. 19), Middle Atlantic Transportation Co., Incorporated.
MC-44605 (Sub-No. 12), Milne Truck Lines, Inc.
MC-45657 (Sub-No. 23), Pie-Walsh Freight Co.
MC-46054 (Sub-No. 73), Brown Express.
MC-47038 (Sub-No. 18), Ship-By-Truck Company, doing business as Graham Ship-By-Truck Co.
MC-47389 (Sub-No. 15), Federal Truck Lines, Inc.
MC-48958 (Sub-No. 36), Illinois-California Express, Inc.
MC-49387 (Sub-No. 12), Orscheln Bros. Truck Lines, Inc.
MC-50034 (Sub-No. 25), Courier Express, Inc.
MC-51255 (Sub-No. 16), Haeckl's Express, Inc.
MC-52629 (Sub-No. 42), Huber & Huber Motor Express, Inc.
MC-52877 (Sub-No. 5), Chicago-St. Louis Express, Inc.
MC-52958 (Sub-No. 13), Hennepin Transportation Co., Inc.
MC-53965 (Sub-Nos. 19 and 21), Graves Truck Line, Inc.
MC-55842 (Sub-No. 6), Superior Freight Lines, Inc.
MC-55848 (Sub-No. 33), Huckabee Transport Corp.

MC-55873 (Sub-No. 30), Great American Transport, Inc.
MC-55896 (Sub-No. 7), Ray Williams Freight Lines, Inc.
MC-59185 (Sub-No. 23), Highway Express, Inc.
MC-59485 (Sub-No. 5), Darling Transfer, Inc.
MC-59583 (Sub-No. 86), the Mason & Dixon Lines, Inc.
MC-59680 (Sub-No. 126), Strickland Transportation Co., Inc.
MC-59894 (Sub-No. 18), Texas-Arizona Motor Freight, Inc.
MC-59957 (Sub-No. 28), Motor Freight Express.
MC-60012 (Sub-No. 48), Rio Grande Motor Way, Inc.
MC-60319 (Sub-No. 7), Murdock & Hatch Motor Transport, Inc.
MC-60393 (Sub-No. 16), Central Transfer Company.
MC-61264 (Sub-No. 9), Pilot Freight Carriers, Inc.
MC-61440 (Sub-No. 72), Lee Way Motor Freight, Inc.
MC-62835 (Sub-No. 13), C.E.S. Truck Lines, Inc.
MC-64994 (Sub-No. 31), Hennis Freight Lines, Inc.
MC-65580 (Sub-No. 9), Mushroom Transportation Co., Inc.
MC-67111 (Sub-No. 12), Kain's Motor Service Corp.
MC-67818 (Sub-No. 64), Michigan Express, Inc.
MC-68078 (Sub-No. 16), Central Motor Express, Inc.
MC-68370 (Sub-No. 5), Larson Transportation Co.
MC-68715 (Sub-No. 11), Summit Fast Freight, Inc., re-entitled Lee Way Motor Freight of Indiana, Inc.
MC-68909 (Sub-No. 59), Decatur-Seaway Motor Express, Inc.
MC-69116 (Sub-No. 49), Spector Freight System, Inc.
MC-69275 (Sub-No. 32), M & M Transportation Co.
MC-69281 (Sub-No. 37), The Davidson Transfer & Storage Co.
MC-69901 (Sub-No. 9), Newsom Trucking Co., Inc.
MC-70451 (Sub-No. 215), Watson Bros. Transportation Co., Incorporated.
MC-71478 (Sub-No. 25), The Chief Freight Lines Co.
MC-71516 (Sub-No. 65), Alabama Highway Express, Inc.
MC-71536 (Sub-No. 4), Arrow Carrier Corporation.
MC-72140 (Sub-No. 39), Shippers Dispatch, Inc.
MC-72300 (Sub-No. 30), Lee-American Freight System, Inc.
MC-73262 (Sub-No. 13), Merchants Freight System, Inc.
MC-73464 (Sub-No. 85), Jack Cole Company.
MC-74120 (Sub-No. 7), Porto Transport, Inc.

MC-75320 (Sub-No. 90) Campbell Sixty-Six Express, Inc.
MC-75406 (Sub-No. 16), Superior Forwarding Co., Inc.
MC-76032 (Sub-No. 142), Navajo Freight Lines, Inc.
MC-76177 (Sub-No. 272), Baggett Transportation Co.
MC-76564 (Sub-No. 64), Hill Lines, Inc., renumbered and reentitled No. MC-48958 (Sub-No. 44), Illinois-California Express, Inc.
MC-78632 (Sub-No. 108), Hoover Motor Express Co., Inc.
MC-78712 (Sub-No. 7), Miller Transportation, Inc.
MC-80382 (Sub-No. 25), Brooks Transportation Co., Inc.
MC-80430 (Sub-No. 94), Gateway Transportation Co.
MC-85749 (Sub-No. 10), Decatur Transit Truck Line, Inc.
MC-97369 (Sub-No. 5), Brooks Truck Lines, Inc.
MC-97699 (Sub-No. 12), Barber Transportation Co.
MC-97788 (Sub-No. 3), Hamburger Motor Express, Inc.
MC-103017 (Sub-No. 15), Mercury Motor Freight, Inc.
MC-104004 (Sub-No. 140), Associated Transport, Inc.
MC-106117 (Sub-No. 4), Rumpf Truck Line, Inc.
MC-106194 (Sub-No. 10), O. W. Horn, doing business as Horn Transportation.
MC-106451 (Sub-No. 4), Cook Motor Lines, Inc.
MC-106456 (Sub-No. 29), Super Service Motor Freight Co., Inc.
MC-106943 (Sub-No. 67), Eastern Express, Inc.
MC-106977 (Sub-No. 23), Ryder Truck Lines of Louisiana, Inc.
MC-107158 (Sub-No. 8), Dennis Truck Lines, Inc.
MC-107475 (Sub-No. 43), Dance Freight Lines, Inc.
MC-107500 (Sub-No. 44), Burlington Truck Lines, Inc.
MC-107511 (Sub-No. 8), Indianapolis-Kansas City Motor Express Company.
MC-108158 (Sub-No. 49), Mid-Continent Freight Lines, Inc.
MC-108461 (Sub-No. 83), Whitfield Transportation, Inc.
MC-108586 (Sub-No. 48), Steffke Freight Co.
MC-108905 (Sub-No. 19), Jasper & Chicago Motor Express, Inc.
MC-109095 (Sub-No. 8), Anderson Motor Service, Inc.
MC-109265 (Sub-No. 8), W. L. Mead, Inc.
MC-109533 (Sub-No. 12), Overnite Transportation Co.
MC-109538 (Sub-No. 12), Chippewa Motor Freight, Inc.
MC-109564 (Sub-No. 6), Lyons Transportation Co.
MC-109914 (Sub-No. 16), Dundee Truck Line, Inc.
MC-110264 (Sub-No. 18), Albuquerque Phoenix Express, Inc.

MC-110325 (Sub-No. 23), Transcon Lines.
MC-110683 (Sub-No. 13), Smith's Transfer Corporation.
MC-111383 (Sub-No. 8), Braswell Motor Freight Lines, Inc.
MC-111557 (Sub-No. 23), Karl E. Momsen doing business as Momsen Trucking Co.
MC-111594 (Sub-No. 15), Central Wisconsin Motor Transport Company.
MC-111871 (Sub-No. 3), Southeastern Freight Lines.
MC-113639 (Sub-No. 4), Carbon Motorway, Inc.
MC-114238 (Sub-No. 3), Ohio Southern Express, Inc.
MC-115093 (Sub-No. 1), Mercury Motor Express, Inc. (Tampa, Fla.).

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 1 1963
JOHN F. DAVIS, CLERK

N[redacted] 177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ROADWAY EXPRESS, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From The United States District Court For The District Of Delaware

MOTION OF MOTOR CARRIER APPELLEES TO AFFIRM

NUEL D. BELNAP
RICHARD J. HARDY
One North LaSalle Street
Chicago 2, Illinois

HARRY C. AMES, JR.
E. STEPHEN HEISLEY
529 Transportation Building
Washington 6, D.C.

LEONARD A. JASKIEWICZ
RONALD COBERT
600 Munsey Buliding
Washington 4, D. C.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1149

ROADWAY EXPRESS, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From The United States District Court For The District Of Delaware

MOTION OF MOTOR CARRIER APPELLEES TO AFFIRM

Pursuant to Rule 16 paragraph 1(c) of the Revised Rules of this Court, the motor carrier appellees, National Tank Truck Carriers, Inc.; Chemical Leaman Tank Lines, Inc.; E. Brooke Matlack, Inc.; Hearin Tank Lines, Incorporated; Highway Transport, Inc.; Lemmon Transport Co., Inc.; Liquid Transporters, Inc.; and P. B. Mutrie Motor Transportation, Inc., all of whom were intervenor-defendants in the court proceeding below, move that the judgment of the district court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered February 4, 1963, by a district court of three judges specially constituted pursuant to 28 U.S.C. §2284 and §2325, dismissing appellants' complaint which sought to set aside orders of the Interstate Commerce Commission.[1]

The Interstate Commerce Commission reports and orders under review[2] were entered after extensive hearings in disposition of extension-of-service applications filed by numerous motor carriers, including the motor-carrier appellants,[3] under §206(b) of the Interstate Commerce Act (49 U.S.C. §306(b)). The applicants hold operating authorities to transport "general commodities" over specified routes and within specified territories restricted against "commodities in bulk and those requiring special equipment." They sought from the Commission additional authority to transport, within the same geographical limits, liquid and dry-flowable commodities in certain newly-developed rubber containers, hereinafter referred to as Sealdtanks or as C & S containers, ranging in size up to

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[1] The opinion of the District Court is reported at 213 F.Supp. 868.

[2] *Western Express Company Extension—Sealdtanks,* 84 M.C.C. 585 (J.S. 32a *et seq*) and *Best Way of Indiana, Inc., Extension—Containers,* 86 M.C.C. 61 (J.S. 81a *et seq*).

[3] There were 14 applicants in the *Western* case. Those applicants included three of the appellants herein, *i.e.*, Roadway Express, Inc., All States Freight, Incorporated, and Terminal Transport, Inc. There were 211 applicants in the *Best Way* case. Those applicants included three of the appellants herein, namely, Transamerican Freight Lines, Inc., Eastern Express, Inc., and Overnite Transportation Company. The decisions of the Commission have been accepted by 219 of the applicants involved in the cases under review.

38 feet long and in capacity to 4,400 gallons.[4] The customary method of using Sealdtanks in transporting liquids is to place the containers, when empty, on a flat bed or van type trailer, load them through a hose or a pipe just as in the case of any tank-type container, transport them over the road while tied down to the bed of the vehicle, and collapse them when being returned empty after being emptied from the vehicle at destination. In transporting dry-flowables in C & S containers, the containers are usually filled prior to placement on the carrier's vehicle.[5] The applications were accompanied by requests that the Commission interpret applicants' existing general-commodity certificates (restricted as above stated) to include the transportation sought by the extension applications and, by motions to dismiss such applications on that ground.[6] Numerous motor carriers authorized to transport commodities in bulk in tank vehicles, including these appellees, intervened and presented evidence in opposition to the applicants.

The Commission resolved the question of certificate interpretation by finding that transportation in Sealdtanks and other C & S containers constituted transportation of commodities "in bulk requiring special equipment" whenever the liquid or dry-flowables were poured into or out of the containers *while on the over-the-road vehicles.* However, when this pouring into the containers took place off the vehicle before the goods were tendered to the carrier for

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[4] J.S. 104a. Sealdtanks are designed to transport only liquid commodities. C & S containers designed to transport dry-flowables (such as Sealdbins), have capacities ranging up to 300 cubic feet (J.S. 105a).

[5] J.S. 36a-38a, 91a.

[6] J.S. 35a and 83a-84a.

transportation, the transportation service was found to be within the authority of the general commodity carriers.[7] This interpretation was found to govern irrespective of whether the containers in question were owned and furnished by shippers or owned and furnished by carriers.[8]

On the question of extended operating authority for the future, the Commission dismissed all applications on the ground that the evidence failed to show that the present and future public convenience and necessity required any of the proposed operations which exceeded the scope of the operating authorities presently held by the applicants as interpreted by the Commission.[9]

The appellants brought this action in the United States District Court for the District of Delaware seeking to have the reports and orders of the Commission set aside, but *only* as applied to transportation services when performed in *shipper-supplied* Sealdtanks and other C & S containers. The District Court dismissed the complaint.[10] One judge dissented on the ground that the Commission's reports were unclear as to whether it considered and properly applied the National Transportation Policy, and, for that reason, there should be a remand.[11]

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[7] J.S. 54a-59a and 84a-85a.

[8] J.S. 57a.

[9] J.S. 60a and 103a.

[10] J.S. 10a-18a.

[11] J.S. 20a-29a.

QUESTIONS PRESENTED

The questions presented as phrased by appellants (J.S. 5-6) tend to obscure the legal questions of the Commission's power and authority on which this case must turn. As we read the Jurisdictional Statement, the questions presented which come within the scope of judicial review may be simply and fairly stated as follows:

1. Are the Commission's ultimate conclusions and orders on the issue of certificate interpretation so clearly irrational, erroneous and arbitrary as to require that its reports and orders be set aside upon judicial review?

2. Are the Commission's reports deficient in that they fail to show that the mandates of the National Transportation Policy were considered by the Commission in reaching its conclusions as to certificate interpretation?

3. Are the orders of the Commission which deny appellants' applications for extended operating authority deficient because not supported by adequate findings or otherwise contrary to law?

ARGUMENT

1. On the question of the rationality of the Commission's interpretation of existing certificates, the decision of the district court is plainly correct.

The Commission could settle the issue of certificate interpretation only by defining the line of demarcation between tank-truck service (transportation of commodities in bulk and in special equipment) and general commodity-carrier service (restricted against the transportation of commodities in bulk or those requiring special equipment). As a trier of the facts with special competence in the field of transportation, the Commission concluded that when liquid or dry flowable commodities are poured, pumped, dumped, etc., into carrier-supplied or shipper-supplied Sealdtanks or other C&S containers premounted on a trailer, even of the conventional type, "the aggregate of facilities provided constituted a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle; and, like such vehicles, the unit in question clearly falls within the category of 'special equipment'."[12] That the inference so drawn is reasonable and not arbitrary, would seem to be beyond dispute. Only when transportation in the involved containers is handled in the same manner as a package of goods—tendered to and received from the carrier in a filled condition—did the Commission conclude that the services were not beyond those authorized by general commodity certificates restricted against the transportation of commodities in bulk or those requiring

[12] J.S. 56a.

special equipment.[13] While these appellees contended before the Commission that transportation when performed under the latter conditions constituted, both in fact and in law, transportation of commodities in bulk and in special equipment, they accepted this phase of the Commission's line of demarcation as a reasonable judgment by an informed and expert administrative agency. Even though the Commission's conclusion can be termed a compromise, it is nonetheless supported on both sides by reason founded on an understanding of the facts of transportation.

In the *Western Express* case, Commissioner Webb, in his dissenting-in-part opinion, acknowledged that the construction accorded the certificates by the majority was "reasonable" and "not patently unsound." (J.S. 61a). No

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[13] The basis for this differentiation was summarized as follows in the *Western* case (J.S. 54a).

> "On the specific question as to whether C & S container transportation belongs within one or the other basic field of service, we think it clear that by its nature such transportation falls exclusively within neither field and should not arbitrarily be so confined. In the past when general freight carriers have transported fungible, flowable commodities, those commodities have been contained or packaged by the shipper—in bags, drums, hogsheads, and the like—prior to tender of the shipment to the carrier. This is the type of transportation service discussed in the *Langdon* case, *supra*, referred to by applicants. On the other hand, shippers of fungible, flowable commodities have been able to offer their traffic to tank truckers without the necessity of having to package it beforehand; it has been necessary for such a shipper merely to pump or pour the commodity directly into the vehicle in which it will be transported. See *Whitfield Transp., Inc.* v. *Solis*, 83 M.C.C. 25. This distinction between packaged and bulk service is basic and is clearly discernible in present and prospective uses of C & S containers. No justification has been shown for applying a different rule or for establishing, arbitrarily, a new one for differentiating between the two types of service in connection with the movement of flowable commodities in C & S containers on ordinary equipment."

more is required of Commission action against the claim of irrationality and arbitrariness. The dissenting district judge did not question the rationality of the Commission's orders, but only its articulation of the consideration given to the National Transportation Policy, a separate and distinct matter dealt with under point 2, *infra*.

Appellants themselves do not question the rationality of the Commission's ruling as applied to Sealdtanks, etc., when supplied by carriers. The self-imposed limitation of their attack on the Commission's order, to services performed in *shipper-supplied* Sealdtanks, etc., is a strong indication of how unsubstantial is the question presented as to the rationality of the order. A particular piece of apparatus has the same utility whether carrier-owned or shipped-owned. If a Sealdtank is a transportation facility when carrier-owned, a proposition not disputed by appellants, it is no less a transportation facility when shipped-owned and supplied.[14]

The specific grounds on which appellants challenge the rationality of the Commission's interpretation are not set forth with particularity in their argument, although implied in their Questions 2 and 3. Their point seems to be that when the shipper supplies the C & S containers and the carrier supplies only an ordinary highway trailer, to which the container is affixed and then filled by the shipper, the Commission's order is irrational because the effect thereof is to "convert" the ordinary highway equipment

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[14] The Commission has so held in the case of rigid tank truck vehicles, *Transport Motor Exp., Inc., Ext.-Lacquers and Paints*, 53 M.C.C. 267 (1951), cited by the Commission in its report in the *Western Express Co.* case (J.S. 52a).

into a tank-truck (J.S. 6). The district court accepted appellants' version of what the Commission "held", and ruled that the "temporary conversion" is supported by "cogent reasons" stated in the report, as well as consistent with the relationship of any operating authority to a carrier's legal right to perform a particular transportation service (J.S. 11a-13a).[15] Nothing said by appellants casts doubt on the validity of the views expressed by the district court on this point.

2. On the question of whether Commission gave consideration to the mandates of the National Transportation Policy in promulgating its interpretation of certificates, the decision of the district court is clearly correct.[16]

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[15] The lower court could have sustained the orders against this claim of an irrational and arbitrary "conversion" on the ground that the Commission did not, in fact, "hold" that there was a "conversion" of equipment from one type to another, dependent on the method and time of loading the C & S containers. The Commission did no more than use the method and time of loading by the shipper as a guidepost to the *character* of the transportation services held out by the carrier to and performed for shippers. The same guideposts are recognized as providing the distinction between the holding out and performance of a tank-truck service and the holding out and performance of a package service. The suggestion that the Commission's use of these guideposts in its interpretation in this case constitutes a "holding" than an ordinary highway trailer is converted to a tank truck is an exercise in semantics, not an appeal to reason.

[16] The appellants in framing their Question 1 relating to the National Transportation Policy, and in arguing with respect to the duty of the Commission in this case under that Policy, seemed to contend that it was the duty of the Commission to enlarge by interpretation general commodity certificates (restricted as herein stated), beyond the bounds reasonably warranted by the terms of the certificates if such enlargement would improve the economy and efficiency

When it appears that such consideration was given, the reviewing court has no further need for inquiry, inasmuch as the weight to be given the evidence and the conclusions of fact to be drawn therefrom are matters exclusively com-

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of service or would tend to result in reduced rates for services rendered in Sealdtanks or other C & S containers. It is unnecessary to consider the narrow question of duty implicit in this contention since the factual premises on which it must proceed are lacking. This is because the assertions of fact in the lettered sub-paragraphs under applicants' Question 1 and on page 12 of the Jurisdictional Statement are not facts found by the Commission in the terms used by the appellants. Nor did the Commission express conclusions by way of inferences drawn from the evidence in the tone and tenor of applicants' recitals. Appellants did not choose to make the complete record of the hearing before the Commission a part of the record in the district court. Consequently, appellants may not now rest on any assertion of fact or factual inference other than those contained in the Commission's findings in its report. Furthermore, such findings must be accepted as in accordance with the evidence and as all that are required by the evidence. *Lubetich* v. *United States*, 315 U.S. 57 (1942); *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282 (1934); *Chicago I. & L. R. Co.* v. *United States*, 270 U.S. 287 (1926); *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U.S. 143 (1923). Even if the record provided the necessary factual support for appellants' contentions on this point, the authorities indicate that the duty of the Commission in interpretating certificates is properly performed when it accords the terms used in certificates such meaning as is reasonable in the light of the transportation facts involved. See, *e.g. Union Cartage Company* v. *United States*, 193 F. Supp. 645, 646-47 (D. Mass. 1961), *aff'd per curiam*, 368 U.S. 143 (1961); *Burlington-Chicago Cartage, Inc.* v. *United States*, 178 F. Supp. 857, 862 (S.D. Ill. 1959), *aff'd per curiam*, 362 U.S. 401 (1960); *Pomprowitz* v. *United States*, 119 F. Supp. 824, 827 (E.D. Wis. 1954), *aff'd per curiam*, 348 U.S. 803 (1954); *Brady Transfer and Storage Co.* v. *United States*, 80 F. Supp. 110, 118 (S.D. Iowa C.D. 1948) *aff'd per curiam* 335 U.S. 875 (1948), sustaining an

mitted to the judgment of the administrative agency.[17] While the cases cited in note 17 below involve questions as to the lawfulness of rates, the distinctions there drawn between what is exclusively a matter for the Commission and what is open on judicial review are equally applicable in cases involving interpretations of operating authorities.

That the Commission did give consideration to the National Transportation Policy is found in the very basis of the argument presented by appellants. That is to say, the test of the sufficiency of the Commission's consideration must be found on the face of the report (cases cited in note 16, *supra*), so that if appellants have a basis for claiming this or that with respect to either the efficiency and economy of the transportation or with respect to the reasonableness of rates, the very existence of that basis is the proof that consideration was given thereto by the Commission in reaching its conclusions. The report shows on its face that the various matter alleged by appellants

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interpretation order in *Transportation Activities of Brady Transfer and Storage Company*, 47 M.C.C. 23, 39-40 (1947), in which the Commission held in effect that an alleged destruction of progress, individual development, and contrariness to the public interest and the National Transportation Policy gives the Commission no warwant for expanding, through interpretation, the scope of a restricted certificate; *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954); *Arrowhead Freight Lines* v. *United States*, 115 F. Supp. 537 (S.D. Calif. 1953); *Arrowhead Freight Lines* v. *United States*, 114 F. Supp. 804 (S.D. Calif. 1953).

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[17] *New York* v. *United States*, 331 U.S. 284, 347 (1947); *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593 (1949); *Barringer & Co.* v. *United States*, 319 U.S. 1, 7 (1943); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 at 352-3 (1940); *Virginian R. Co.* v. *United States*, 272 U.S. 658, 663 (1926); and *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 286 (1924).

to be relevant under the National Transportation Policy were taken note of.

The fact that the Commission reached the conclusions it did in the face of appellants' claims as to the effect of one interpretation or the other on efficiency and economy of transportation and upon the reasonableness of rates, is in itself the necessary demonstration that it considered these mandates in the National Transportation Policy and found them no barrier to the interpretation enunciated. *Luckenbach S. S. Co., Inc.* v. *United States*, 122 F. Supp. 824, (1954), *aff'd per curiam* 347 U.S. 984 (1954).

Furthermore, the characterization of the Commission's conclusions as a "compromise" (J.S. 18, note 18) is really only another way of saying that it did, in fact, balance the factors to be observed and weighed under the National Transportation Policy. It is that weighing and balancing which led it to interpret the involved certificates so that the general commodity carriers and tank-truck carriers would each be authorized to conduct transportation in C & S containers consistent with their usual mode of transportation, and without infringement of the rights of other carriers. No more was required of the Commission and appellants' contentions to the contrary raise no substantial question.

3. Whether applicants seek to present a separate and distinct question as to the validity of the orders insofar as they deny the appellants' applications for extension of operating authorities, is not clear from their Jurisdictional Statement; nevertheless we have stated the question above.

The duty and the power of the Commission to grant a new or extended operating authority is conditioned upon the entry by it of a finding that the authority sought "is or will be required by the present or future public convenience and necessity." (49 U.S.C. §307(a)) That condition necessarily runs to a specific carrier-applicant and

to a particular proposed service. If there is a deficiency in existing services, that must be shown as to a particular transportation service before new authority is authorized to meet an unfilled need. There is no finding in the Commission's report to the effect that any shipper on any of the routes served by appellants has requested in vain a Sealdtank or other C & S service from tank-truck carriers. There are repeated references to the fact that tank-truck carriers are willing and able to supply any service authorized by their certificates for which shippers have need. (J.S. 43a, 49a, 98a, and 103a) There are findings that services requested by shippers in premounted Sealdtanks are being presently rendered by tank-truck carriers. (J.S. 49a, 98a) Upon a weighing of the evidence, the Commission held in categorical terms that the evidence would not support a finding as to unfilled needs for any of the services in Sealdtanks or other C & S containers proposed by any one of the 200-plus applicants involved in the Commission proceedings.[18]

Appellants did not make the complete record of the hearings before the Commission a part of the record in the lower court. Consequently, the Commission's findings of fact that the evidence failed to establish that the present or future public convenience and necessity require any of the proposed operations which exceed the scope of the appellants' presently held rights must be accepted as in accordance with the evidence.[19] There is no requirement in the National Transportation Policy which enlarges the power and the duty of the Commission under 49 U.S.C. 307(d) so as to compel it to grant a new operating authority in the absence of proof of a need for a service which existing carriers are either unable or unwilling to fulfill.

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[18] 84 M.C.C. at 603-04; 86 M.C.C. at 75-76; J.S. 58a-59a and 101a-103a.

[19] First group of cases cited in note 16, pp. 9-10, *supra*.

The contention that the Commission on the record before it should have found as to each and every point and route through the United States served by more than 200 general-commodity motor carriers that there was a need for the additional services not embraced within the applicants' existing certificates, and that carriers with certificates authorizing such services were unable or unwilling to perform it is no less than fantastic. It would have been the rankest departure from established Commission precedent had the Commission given wholesale authority to all general-commodity carriers without a showing of specific, unfulfilled needs.

It follows that the Commission's denial of the applications for extended operating authority presents no substantial question for the decision of this Court.

CONCLUSION

We, therefore, respectfully submit that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Nuel D. Belnap, Attorney for Appellees, National Tank Truck Carriers, Inc.; Chemical Leaman Tank Lines, Inc.; E. Brooke Matlack, Inc.; Hearin Tank Lines, Incorporated; Highway Transport, Inc.; Lemmon Transport Co., Inc.; Liquid Transporters, Inc.; P. B. Mutrie Motor Transportation, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of June, 1963, I served copies of the foregoing Motion to Affirm of said Appellees on the several parties by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, as follows:

(1) On the Appellants, Roadway Express, Inc.; All States Freight, Inc.; Terminal Transport, Inc.; Transamerican Freight Lines, Inc.; Eastern Express, Inc.; Overnite Transportation Company, United States Rubber Company, copies to their attorneys, John C. Bradley, Esq., and Homer S. Carpenter, Esq., 618 Perpetual Building, Washington 4, D. C.; Howell Ellis, Esq., 616-618 Fidelity Building, 111 Monument Circle, Indianapolis 4, Indiana, and, Messrs. Arthur, Dry, Kulesh & Wood, 1230 Sixth Avenue, Rockefeller Center, New York 20, New York.

(2) On the United States of America, Appellee, copies to the Honorable Archibald Cox, Solicitor General of the United States, William H. Orrick, Jr., Assistant Attorney General, Robert B. Hummel and Colin A. Smith, Attorneys, Department of Justice, Washington 25, D. C.

(3) On the Interstate Commerce Commission, Appellee, copies to Robert W. Ginnane, Esq., its General Counsel and Robert S. Burk, Attorney, Washington 25, D. C.

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692-939—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 177

ROADWAY EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing an action brought by appellants to set aside orders of the Interstate Commerce Commission. Those orders, entered in separate proceedings instituted at different times by two groups of motor common carriers of general commodities, interpreted certain commodity restrictions in their existing certificates and denied their

alternative applications for extension of their operating rights.[1]

In both cases (*Western Express* and *Best Way*) the carriers sought extension of their operating rights to enable them to transport liquid and dry flowable commodities[2] in collapsible or stackable containers (termed "C&S" containers), a service ostensibly not authorized by their existing certificates. Such applications were coupled with requests or motions to dismiss on the ground that applicants' present certificates already contained the authority sought.[3]

The two proceedings grew out of confusion and conflicting views within the industry as to the degree of applicability to newly-developed collapsible and stackable containers of restrictions in the certificates of motor common carriers of general commodities against transportation of "commodities in bulk" and/

[1] In *Western Express Company Extension—Sealdtanks*, 84 M.C.C. 585 (J.S. 32a–80a), March 22, 1961, the entire Commission (two commissioners dissenting) decided a group of 14 application cases. In *Best Way of Indiana, Inc., Extension—Containers*, 86 M.C.C. 61 (J.S. 81a–118a), April 28, 1961, the entire Commission (two commissioners not participating) decided a group of 211 similar applications. The two commissioners who had dissented in *Western Express* concurred, on the ground that the latter case had decided the issue (J.A. 103a).

[2] Dry flowable materials are non-liquid substances which by reason of being in granular, powdered, or pellet form are capable of being poured into containers.

[3] This is the usual method of obtaining a Commission interpretation of existing operating authority. *Schenley Corp.* v. *United States*, 326 U.S. 432, 436.

or "commodities requiring special equipment".[4] The C&S containers here involved range in liquid capacity from 55 gallons to 4,400 gallons (Sealdrums, Sealdtanks, Nest-A-Bins) and in dry flowable capacity from 63 cubic feet to 300 cubic feet or 18,000 pounds (Sealdbin and Nest-A-Bin). They have the common characteristic of being collapsible to a relatively small size when empty (Sealdrums, Sealdbins, Sealdtanks, made of nylon tire cord), or stackable when empty (Nest-A-Bin, made of aluminum), enabling the carrier to utilize most of the space on the return haul for other lading. The largest container, the Sealdtank, is ordinarily mounted empty on the vehicle, tied down, and filled in place; the others are usually filled prior to loading.[5]

As the Commission noted in *Western Express*, the uses of these various C&S containers "tend to blur the heretofore relatively clear distinction between the field of service of the general freight carrier and that of the carrier of bulk commodities whether liquid or dry, and whether transported in tank, dump, or hopper type vehicles" (J.S. 53a). This distinction had previously been recognized in the authority granted to bulk carriers to haul "commodities in bulk" or "commodities requiring special equipment" and the exception of such authority in the certificates of general com-

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[4] The Commission discusses the history of these restrictions or exceptions, their meaning, and the dichotomy of motor common carriers based thereon in the *Western Express* opinion (J.S. 51a–53a).

[5] A detailed description of these various containers is contained in the *Western Express* opinion (J.S. 36a–38a); see, also, *Best Way* (J.S. 91a).

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modities carriers. Thus, the appellants' applications in both cases presented to the Commission the task of interpreting this terminology.

After an extensive discussion the Commission concluded in the *Western Express* case (J.S. 51a–59a), that the certificate restrictions should be construed in accordance with the historic difference between the "package" service offered by appellants and the "bulk" service offered by tank truckers, namely, that "the containers [are] package-like when *treated as packages* (i.e., tendered to and received from the carrier *when filled*)" (J.S. 10a–11a).[6] Under this

[6] This criterion was explained by the Commission as follows (J.S. 54a):

"On the specific question as to whether C&S container transportation belongs within one or the other basic field of service, we think it clear that by its nature such transportation falls exclusively within neither field and should not arbitrarily be so confined. In the past when general freight carriers have transported fungible, flowable commodities, those commodities have been contained or packaged by the shipper—in bags, drums, hogsheads, and the like—prior to tender of the shipment to the carrier. This is the type of transportation service discussed in the *Langdon* case, *supra* [27 M.C.C. 391] referred to by applicants. On the other hand, shippers of fungible, flowable commodities have been able to offer their traffic to tank truckers without the necessity of having to package it beforehand; it has been necessary for such a shipper merely to pump or pour the commodity directly into the vehicle in which it will be transported. See *Whitfield Transp., Inc.* v. *Solis*, 83 M.C.C. 25. This distinction between packaged and bulk service is basic and is clearly discernible in present and prospective uses of C&S containers. No justification has been shown for applying a different rule or for establishing arbitrarily, a new one for difference between the two types of service in connection with the movement of flowable commodities in C&S containers on ordinary equipment."

theory the right of the general-commodity carriers to carry goods in C&S containers depends upon whether the goods are placed in and removed from the container while the container is mounted upon the truck or trailer ~~(and removed therefrom)~~. On this basis the Commission ruled in *Western Express* (J.S. 59a):

> Summarizing, we conclude (1) that general-commodity carriers with restrictions against the transportation of commodities in bulk or those requiring special equipment *are* authorized to transport loose, flowable, and fungible commodities when tendered in dismounted C&S containers, whether supplied by the carrier or shipper, (2) that general-commodity carriers, as described in (1) above, *are not* authorized to transport such commodities when tendered into a premounted C&S container; and (3) that tank-truck carriers *are* authorized to transport such commodities when tendered into a premounted C&S container, whether supplied by the carrier or shipper.

These conclusions on the interpretation of the certificates were subsequently reaffirmed in *Best Way* (J.S. 84a–85a, 86a).

In both cases the Commission also held that appellants had not met their burden of proof on their applications for new authority (J.S. 14a). The Commission pointed out that its interpretation of existing certificates permitted extensive service in most of the C&S containers (J.S. 58a, 99a–101a). As to the remainder, it held that appellants had not shown that the bulk carriers were unable or unwilling to provide service in C&S containers, and it stated that "at the

least" they "should be afforded an opportunity" to expand their service to satisfy shipper needs before the appellants were granted further authority (J.S. 58a–59a, 101a–103a).

A divided three-judge district court, noting the limited scope of judicial review in this area (J.S. 8a–10a), held (J.S. 20a) that "the conclusions of the ICC as to interpretation and public convenience and necessity [and, 'National Transportation Policy'] have a rational basis and are consistent with the findings from the evidence submitted by the parties."

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. The construction or interpretation of Commission operating certificates is primarily within the Commission's province, and the agency's interpretation is controlling on the courts unless clearly erroneous, arbitrary or capricious. *Nelson, Inc.* v. *United States,* 355 U.S. 554, 558. Similarly, the determination whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535–536; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Since, as the court below held, the Commission's conclusions "have a rational basis and are consistent with the findings" (J.S. 20a), the orders must stand.

1. Appellants' existing certif ates, the Commission recognized, were formulated to reflect the general-commodity carriers' actual service prior to regula-

tion, and the provisions against "bulk" carriage or use of "special equipment" were intended not only to restrict the carriers but also to protect them from having to accept commodities which they were not equipped to handle (J.S. 51a–53a). As the Commission further noted, these provisions are not readily applied to the novel collapsible and stackable containers involved in this case, since this form of transportation "tend[s] to blur" the heretofore relatively clear distinction between general and bulk carriage (J.S. 53a–54a).

The Commission's solution was to examine the traditional scope of general carriage for an applicable criterion. It found (J.S. 54a) that the "basic" differentiation between general-commodities carriers and the tank truckers has been that the former held themselves out to transport commodities when offered for transportation in prepackaged form by the shipper, while the latter held themselves out to accept commodities from the shipper in a loose, unpackaged state. It is this historic dichotomy that the "package-tank" criterion reflects, as the district court correctly stated (J.S. 11a–12a). Applying this criterion to C&S containers, the Commission found that when the container is first mounted on a vehicle and then filled, "the aggregate of facilities provided constitutes a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle" (J.S. 56a). For this reason, this use of the new containers was held to be outside the general-commodity carriers' existing authority.

Contrary to the appellants' implications (J.S. 8, 9), this ruling gave them most of the authority which they sought. Appellants *are* authorized to transport any of the containers filled before loading on the vehicle and emptied after unloading therefrom (J.S. 59a), provided that the carrier utilizes ordinary trailer equipment and does not employ specialized loading equipment, such as cranes, winches, etc. (J.S. 55a). The record shows that all the C&S containers except the Sealdtank, the largest container, are normally used in the manner authorized by the Commission (J.S. 36a–38a, 91a). The Commission's construction of the existing certificates as permitting carriage of Sealdtanks only when so used rests upon its "legitimate inference" (J.S. 10a) as to the nature of the use (see *Radio Corporation of America* v. *United States,* 341 U.S. 412, 419–420) and its judgment, as the expert agency, of the indicia of general commodity carriage (*Nelson, Inc.* v. *United States,* 355 U.S. at 558; *American Trucking Assns.* v. *United States,* 344 U.S. 298, 310, 314).[7]

[7] Appellants contend that the Commission's criterion is unreasonable because it can result in a general-commodity carrier's service being lawful or unlawful on the basis of what the shipper does about loading or unloading the vehicle, specifically since this basis can and would convert an ordinary trailer to special equipment (J.S. 6). But the different consequences would flow from facts within the carrier's control, its holding out (accepted by the shipper) to accept commodities in a loose, flowable state into a tank mounted on the vehicle rather than in prepackaged form. To the extent that the Commission's view may be regarded as novel, it was "not estopped by its own precedents in the continuing regulation of a dynamic industry, in the reasonable exercise of its expertise under Congressional mandate. See *Virginian Railway Company* v. *United*

2. The Commission's denial of additional certificates of public convenience and necessity clearly relates only to the service not covered by the ruling on the interpretation question—*i.e.*, the use of the containers mounted on vehicles before filling, particularly the Sealdtanks, as above explained. The Commission correctly pointed out that the grant of such new competitive service under Section 207 must be supported by evidence establishing (1) that there is a public need for the new service, (2) that existing service is inadequate, and (3) that existing services would not be impaired contrary to the public interest (J.S. 101a–102a). The Commission was justified in concluding that the appellants had not made an adequate showing on these issues. There was scant evidence relating to specific routes and specific commodities; and no showing that the tank truck carriers would not be able to satisfy shipper needs, which they assert they are willing and able to do (J.S. 58a–59a, 102a–103a). As the Commission stated, the appellants were in effect seeking "*carte blanche* authorization * * * to invade the established field of service of bulk motor carriers whenever or wherever it is to their advantage" (J.S. 101a). The Commission properly denied their applications.

The present case, involving a technological advance in motor transportation, the potential ramifications of which have not yet been clearly explored, is one which lies particularly within the agency's expert judgment.

States, 272 U.S. 658, 663, 666." *ABC Freight Forwarding Corp.* v. *United States*, 169 F. Supp. 403, 405 (S.D.N.Y.). See, also, cases collected and discussed by the district court, fn. 28, J.S. 12a–13a.

The Commission concluded that its interpretation of the existing certificates should encourage appellants to provide extensive and valuable new C&S container service to the shipping public (J.S. 58a, 100a–101a). If this new service, together with that reserved to the tank truckers, should ultimately be inadequate to meet shipper needs, or result in artificially high transportation cost (as appellants allege it will), then, as the Commission and the court below recognized (J.S. 15a–16a, 102a–103a), appellants and shippers have adequate remedies under the Act. Indeed, subsequent to its decision in the instant cases, the Commission granted certain general-commodity carriers the authority to use Sealdtanks and other C&S containers premounted on trucks, when the carriers presented adequate evidence of the need for this service for carriage of specific commodities on specific routes. *Los Angeles-Seattle Motor Express, Inc.—Extension—Collapsible Containers,* 89 M.C.C. 621.

In these circumstances, the decisions in *Bestway* and *Western Express* represent a proper implementation of the National Transportation Policy. As the court found (J.S. 16a–20a), the Commission adequately disclosed the factors it weighed and gave due consideration to the objectives of achieving efficient and economical service, and sound and competitive economic conditions. Of course, the result reached

through balancing of these factors might result in some curtailment of the present use of C&S containers in order presently to protect tank carriers, and temporary loss of some possible economies of service in order to preserve sound economic conditions in the entire industry. But this "broad look" was essential to preserve competitive balance in the industry (J.S. 19a–20a), while at the same time adequately providing for the presently foreseeable "prospective" needs of shippers (J.S. 15a). The Commission's resolution of these difficult problems represents a carefully formulated "compromise between stability and flexibility of industry conditions, each alleged to be in the national interest." *American Trucking Assns.* v. *United States*, 344 U.S. 298, 313–314. The agency's decision is "the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts"; it is the type of judgment which Congress entrusted to the Commission's informed discretion. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting plenary consideration, and that the judgment of the district court should be affirmed.

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No. 177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ROADWAY EXPRESS, INC., ALL STATES FREIGHT, INC., TERMINAL TRANSPORT, INC., TRANSAMERICAN FREIGHT LINES, INC., EASTERN EXPRESS, INC., OVERNITE TRANSPORTATION COMPANY, UNITED STATES RUBBER COMPANY, *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the District of Delaware

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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July, 1963

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In their motions to affirm, both the Government and the motor carrier appellees support a version of motor carrier certificate interpretation which they admit was motivated by the desire of the Interstate Commerce Commission to reach a compromise between the interests of two competing segments of the industry. They reject the principle that interpretation of a certificate should be consistent with the reasons for drafting it as it was in the first instance and the purpose sought

to be attained thereby. They rely upon theories which have no rational basis, and no support in precedent.

Moreover, appellees insist that the Commission may refuse alternatively to grant to appellant carriers the specific right to provide the transportation of containers even though by such refusal the Commission did force upon the shipping public the service of a class of carriers shown by its own findings to be ill-equipped and unable to provide efficient and economic transportation of "Sealdtank" and "Sealdrum" containers.[1]

If the Commission's decisions below are permitted to stand, there will thus be affirmed an approach to regulation of the motor carrier industry which would deny to literally thousands of general freight carriers their right to logical and reasonable use of their vehicles, which would discourage invention and progress in the art of motor carrier transportation, and which would deny to the shipping public its right to efficient and economic service.

Appellees contend that the Commission's decision must stand unless shown to be "clearly irrational." However, the law places a greater responsibility upon the Commission than mere avoidance of irrationality. Instead, there must be clearly set forth in its decision a rational basis upon which to found the conclusions reached by the Commission.[2] Furthermore, the de-

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[1] The words "Sealdtank" and "Sealdrum" are trade names registered by appellant United States Rubber Company.

[2] *Gilbertville Trucking Co.* v. *United States*, — U.S. —, 9 L. ed. 2d 177 (1962); *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282, 287 (1934); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939); *Burlington Truck Lines* v. *United States*, — U.S. —, 9 L. ed. 2d 207, 214 (1962).

tailed findings in its report must support without fundamental conflict the basis or bases adopted. The decisions of the Commission below are defective in both respects.

Underscoring these defects is the failure of the Commission to dispose of the cases before it in accordance with the mandate of the National Transportation Policy.[3] The policy requires that the Commission "recognize and preserve the inherent advantages of each" mode of transportation, promote "economical and efficient service," and "encourage the establishment and maintenance of reasonable charges * * *." The decisions below are in utter and obvious conflict with the objectives of the National Transportation Policy and the Commission has not specified in terms clear to the parties or to a reviewing court any basis upon which it can be said that the requirements of the National Transportation Policy have been met.[4]

The only limitations upon the type of service which appellants as general commodity carriers are author-

[3] 49 U.S.C. preceding Section 1.

[4] Appellee motor carriers in their motion, page 11, seek to avoid the impact of this issue by contending that, since these appellants have continuously pointed to the conflict between the National Transportation Policy and the Commission's decisions, the Commission must have given the issue consideration, and, therefore, the failure of the decisions to articulate the ground upon which the conflict might be resolved presents no error. Had the appellants failed to assert the conflict, we may assume that appellees would now contend that the right to argue the issue had been waived. Be that as it may, this Honorable Court has required somethir more from the Commission than the standard for which appellees argue. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

ized to provide are those specifically imposed in the operating certificates granted to them.[5] As here pertinent there are two such service limitations. One prevents the transportation of "commodities in bulk" form. The other prevents the hauling of those "commodities requiring special equipment."

Literally speaking, when a shipper fills his own "Sealdtank" container with a liquid commodity and thereafter tenders the entire "package" to a carrier for transportation, it cannot logically be said that the carrier receives the commodity in bulk form. Clearly it is in a container—here a "Sealdtank" container. No special equipment is required to transport it. Only ordinary equipment of the kind which make up the vehicle fleets of general commodity carriers is suited to the transportation of such containers.[6]

However, the Commission has never made a practice of interpreting literally the so-called "usual exceptions" in general commodity certificates. Traditionally it has based such interpretations upon the *reason* why an exception was devised in the first instance. The Commission has said that the "usual exceptions" in general commodity certificates were meant to identify some area of transportation activity *required of the carrier*, either vehicles of a kind not included among those normally used or held out by a general freight carrier or some incidental equipment or corollary service similarly of an unusual nature. In one of the decisions here assailed the Commission specifically ac-

[5] *Coastal Tank Lines, Inc.* v. *Pioneer Trucking Corp.*, 79 M.C.C. 101, 103 (1959); *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 301-302 (1948).

[6] J.S. 99a.

knowledged the real reason why the concept of the "usual exceptions" was invoked, stating:

> "* * * The reason why general-commodity carriers have historically been excluded from transporting the classes of commodities described by these exceptions is well summarized in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, at page 268:
>
> > 'The motor carriers of general commodities were not in the early stages of their development, and generally are not now *equipped* to handle dangerous explosives, money, securities, or other articles of very high value, household goods, sand, coal, and other commodities which usually move loose in bulk, or any commodity which *requires the use of equipment not ordinarily used in the movement of packaged or dry freight*. Prior to the enactment of the Motor Carrier Act, previously referred to, the motor common carrier, insofar as interstate commerce was concerned, had no legal duty to transport all the traffic tendered to it, and consequently its holding out fell into well-defined channels. It transported *such commodities only as would readily load onto its equipment* without damage to other lading or to equipment and which would not exceed the carrying capacity of its vehicle. With the passage of the Motor Carrier Act, motor common carriers were permitted to continue such operations as they conducted on the critical date and continuously thereafter. The exceptions then as now reflect the general-commodity carriers' self-imposed limitations.'[7] (emphasis supplied)

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[7] *Western Exp. Co. Extension—Scaldtanks*, 84 M.C.C. 585 (1961) [J.S. 51a].

In recognition of the acknowledged origins of the "usual exceptions" the Commission in literally dozens[8] of cases has ruled that so long as the service *required of the carrier* does not involve extraordinary vehicles, equipment or services not a part of the general freight carrier's normal holding out, the resulting transportation service is authorized regardless of the existence of any "usual exception." Even where a large and bulky article requires use of special loading equipment, so long as it is provided and operated by the consignor and/or the consignee—rather than the carrier—the "special equipment" exception does not apply.[9]

These precedents and their underlying principles the Commission would now disregard. It has said that if one of the appellant carriers transports its own ordinary trailer upon which a consignor has placed a filled container the carrier has been called upon to perform an ordinary, non-special, and fully authorized service. But if the shipper for reasons of efficiency and economy chooses to alter the sequence of the filling of the container and the loading of it upon the vehicle, the subsequent hauling service is that of a tank truck operator and thus of a specialized kind denied to appellant general freight carriers. Clearly the carrier in either situation provides the same equipment, performs the

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[8] See, for example, *American Red Ball Transit Co., Inc.* v. *McLean Trucking*, 67 M.C.C. 305, 315 (1956); *Armored Motor Service Co., Inc., Ext.—Coin and Bullion*, 69 M.C.C. 609, 613 (1957); *Alterman Transport Lines, Inc. Extension—Aluminum*, 83 M.C.C. 305, 308 (1960).

[9] *W. J. Dillner Transfer Co.—Investigation of Operations*, 79 M.C.C. 335, 356 (1959); *Dallas & Mavis Forwarding Co., Inc., Ext. —Galion, Ohio*, 79 M.C.C. 285, 292 (1959); *Bennett Common Carrier Application*, 82 M.C.C. 353, 358 (1960); *Dealers Transit, Inc., Extension—Radioactive Waste*, 88 M.C.C. 375, 379 (1961).

same acts, and thus is called upon to provide the same service. The distinctions upon which the Commission's interpretation is based are no distinctions at all. As a consequence the entire fabric of reasoning relied upon by the Commission to support its certificate interpretation is ineffective.

In a desperate effort to defend the Commission's theory, appellees imply that general commodity carriers are limited to the transportation of relatively small "packages" and contend that a carrier taking possession of a container filled by the consignor after placement[10] on the vehicle thereby receives the contents in bulk. This attempt to justify the Commission's interpretation is riddled with fallacies.

First, appellant carriers are not restricted to the transportation of small packages. The Commission has held that general commodity carriers can lawfully transport a single item or "package" weighing 31,000 pounds,[11] or a 20 ton container,[12] so long as the shipper loads the item upon the trailer. And unquestionably in the circumstances involved in this case, the consignor provides the loading.[13]

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[10] The Government erroneously suggests (page 3 of its motion) that a collapsed "Sealdtank" container can be first tied to a trailer and then filled. Only *after* filling may the container be tied down for transportation. The Commission's theory of "premounted" containers is thus faulty, in that the "Sealdtank" container, as with lumber, steel rods, machinery, or other general freight, is simply tied to the vehicle for safety during transportation.

[11] *International Transport, Inc., Extension—Winona, Minn.*, 82 M.C.C. 1 (1959).

[12] *Dealers Transit, Inc., Extension—Radioactive Waste*, supra.

[13] J.S. 37a, 79a-80a.

Second, quite clearly the carrier takes possession of the same "package" and contents regardless of the procedure by which someone else, the consignor, may have prepared it for shipment, and the same transportation service is required of the carrier. Yet, the Commission illogically found a distinction.

Third, a carrier taking possession of a filled container, regardless of where or when it was filled, does not receive the contents of the container in bulk form. When received, the contents are "packaged" in the shipper's container.

In an effort to justify its conclusions, the Commission itself contended that an ordinary trailer used to transport a container filled after loading is the "practical equivalent" of a tank vehicle. Appellants admittedly cannot lawfully utilize tank vehicles but they can use an ordinary van. And clearly an ordinary van is nothing more than just that. No change or modification of it is accomplished by reason of the lading temporarily placed upon it, or, for that matter, by the means chosen by a shipper for filling a container placed by the shipper on the vehicle and, after transportation, removed by the consignee. As a further indication of the irrationality of the Commission's erroneous interpretation, the carrier's *completed transportation* service can be *changed* from what the Commission calls a non-specialized service to what it calls a specialized service merely by the procedure by which the consignee elects to remove the container and its contents from the non-specialized vehicle used to transport it.

The foregoing emphasizes the defects in the Commission's decisions and its failure to set forth a rational basis to support its own conclusions. The same con-

siderations are present in the Commission's treatment of the issue of public convenience and necessity, i.e., whether, assuming the validity of its interpretation, appellant carriers should be certificated to permit uninhibited transportation of "Sealdtank" containers and other collapsible or "stackable" containers for the shipping public. That such a service is *needed* by the shipping public was made the subject of a specific finding:

> "Here a definite prospective need on the part of the shipping public for motor common carrier transportation of flowable, fungible commodities in C & S containers in quasi-bulk-type service has been shown."[14]

The Commission then found that, since the tank truck operators (including the motor carrier appellees) had *expressed* a "willingness and ability"[15] to transport the containers, the shipping public did not *need* the services of the general freight carriers. This conclusion was reached in direct conflict with the following findings:

> "The vast majority of the tank protestants do not operate the conventional van or flatbed equipment necessary for efficient transportation of C & S container traffic, and with few exceptions they have published tariff minima of 4,000 gallons

[14] J.S. 102a.

[15] In their motion, appellee carriers contend (page 13) that tank carriers were shown to be serving shippers of "Sealdtanks", citing J.S. 49a, 98a. Appellees neglect to point out that there were only two such instances shown of record. One involved P. B. Mutrie Motor Transportation, Inc., which is both a *general commodity* and a tank carrier and—in the former capacity operates ordinary vehicles (J.S. 48a-49a). The other was a carrier which had to rely upon the shipper to furnish the ordinary vehicle (J.S. 98a).

> or 28,000 pounds applicable to their transportation of less-than-truckload quantities of authorized commodities. Also, for the most part, they do not have the benefit of return payloads in their operations, meaning than on an average between 40 and 50 percent of their line-haul mileage involves deadhead transportation, a factor reflected in the basic rate structure not only of protestants, but of all motor tank carriers."[16]

As seen, the Commission has concluded that appellant carriers should not be specifically authorized to transport "Sealdtank" containers and their contents in what is called "quasi-bulk" service on the theory that specialized tank carriers can and will provide the transportation found to be needed. The Commission thus would require the shipping public, including specifically appellant United States Rubber Company:

(1) To seek service from a type of carrier which the Commission itself found did not operate the kind of vehicles needed to transport a container.[17]

(2) To pay truckload rates imposed by the almost uniform high tariff minima upon all shipments, regardless of size, and including those of the small less truckload kind.

(3) To pay rates fixed at a level to compensate for the empty or "deadhead" return movement of the vehicle.

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[16] J.S. 99a.

[17] This finding alone should have been sufficient to alert the Commission to its error on the interpretation issue which it decided by concluding that the class of carriers traditionally operating the kind of vehicles needed was not authorized to do so, but that the class of carriers authorized to do so did not operate the kind of equipment needed.

The Government's motion suggests, somewhat vaguely, that the shipper thus confronted with an artificially high transportation cost has "adequate remedies under the Act." However, the deadhead factor in the operations of tank carriers is an *inherent* characteristic and is not something which can be cured by issuance of a maximum rate order. The Commission is without the power to impose a confiscatory rate structure. Tank carriers traditionally experience enormous deadhead mileage because of the specialized nature and limited variety of the commodites they haul. On the other hand, the general commodity carrier uses his conventional vehicles to transport almost any "general commodity," i.e., any freight which will help balance his operation and hold to a minimum his empty mileage factor. The general commodity carrier has a proven ability to base rates on balanced[18] movements and loaded miles. The Commission's report contains findings indicating the availability of a lower rate structure in general commodity service.[19]

The Commission's conclusions on the certification issue not only lack a rational basis of support in the discussion of the evidence, but also are in direct conflict with those crucial findings by the Commission enumerated above. No attempt was made in the decisions to establish any grounds for reconciling the illogical conclusions with the conflicting findings. An order which is in plain opposition to the Commission's find-

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[18] See J.S. 46a.

[19] See J.S. 47a, 94a, 95a, 96a, 97a, 98a.

ings cannot be permitted to stand.[20] The Commission did not "articulate any rational connection between the facts found and the choice made."[21]

Judge Wright in his dissent observed that:

> "At worst, the ICC has ignored certain relevant portions of the National Transportation Policy. It is reasonable to conclude that the Commission has failed to evaluate the rate factor and others under the "economical and efficient service" heading. At best, though conflict is apparent and decision may be contrary to the public interest, it *is extremely difficult, if not impossible, to follow the ICC's reasoning.* Both alternatives justify reversal."[22] (Emphasis supplied)

Judge Wright has succinctly stated an accurate judicial appraisal of the two decisions of the Interstate Commerce Commission.

CONCLUSION

It is clear that the issues before this Court are of tremendous importance in the regulation of the motor carrier industry and to the shipping public. They war-

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[20] *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U.S. 80, 96 (1931). Moreover, the Commission cannot be sustained if the reasons specified are insufficient justification for its actions. *American Trucking Assos.* v. *United States, I. C. C.*, 364 U.S. 1, 14 (1960); *Eastern-Central M. C. Asso.* v. *United States*, 321 U.S. 194, 210 (1944).

[21] *Burlington Truck Lines* v. *United States*, supra, at page 216.

[22] J.S. 29a.

rant plenary consideration. The judgment of the District Court should be reversed.

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